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# SUPREME COURT OF THE UNITED STATES.

No. 284.

THE CITY OF NEW ORLEANS, APPELLANT,

*versus*

JOHN A. MORRIS, FREEMAN CLARKE, CHAS T. HOWARD, JOHN KLEIN, AND JACK WHARTON.

*Appeal from the Circuit Court of the United States for the District of Louisiana.*

BRIEF OF COMPLAINANT AND APPELLANT.

E. HOWARD McCALEB,
For Complainant and Appellant.

A W Hyatt, Print, 73 Camp St. N O—21,980

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### STATEMENT OF CASE.

By an act of the Legislature of the State of Louisiana, approved April 1st, 1833 (Acts of 1833, p. 151—see appendix to this brief), entitled "An Act to Incorporate the Commercial Bank," a corporation was created, to which extensive banking privileges were given, and on which was conferred the exclusive privilege of supplying the inhabitants of the city of New Orleans with water from the Mississippi river, by means of pipes and machinery.

It was provided by the fourth section, that at the expiration of thirty-five years from the passage of the act, it should be lawful for the corporation of the city of New Orleans to purchase from the Commercial Bank the waterworks constructed by it in virtue of said act, and that said bank should not refuse to sell

said works, as aforesaid. The act provides for the mode of determining the value of the works to be thus sold and purchased, and declares that the city shall pay the purchase price in her own bonds, to be issued for that purpose.

Shortly before the expiration of the period of thirty five years above mentioned, the city resolved to exercise the right of purchase given her under the charter of the Commercial Bank, and accordingly, on January 19th, 1869, the bank sold and delivered the waterworks to the city, receiving in return therefor $1,393,400 in bonds, as provided in the act of incorporation.

The corporation known as the "Commercial Bank" thereupon became extinct, because it had forfeited its charter in 1842, by suspending specie payments, and had gone into liquidation under the provisions of the act approved March 5th, 1842 (acts of 1842, p. 46, see Appendix), by the seventh section of which it was allowed to retain so much of its corporate existence as was necessary to enable it to maintain and operate this public work which it had constructed.

One year after this purchase, by act approved March 16th, 1870, the city of New Orleans was given a new charter, by the terms of which special provision is made for the maintenance and operation of these waterworks as one of the functions of the municipal government. By this new charter a department was created and called the Department of Waterworks and Public Buildings, and at the head of this department was placed an officer called the "Administrator of Waterworks and Public Buildings," who constitutes one of the City Council. (See Appendix).

These waterworks were thus maintained and operated by the city, until some time in the year 1878, when they were transferred to a new corporation.

This new corporation was created by the following act of the Legislature, approved March 31st, 1877, which we shall give in full, title and all:

# EXTRA SESSION OF 1877.

No. 33.] AN ACT

To enable the City of New Orleans to promote the public health and to afford greater security against fire, by the establishment of a corporation to be called the "New Orleans Waterworks Company;" to authorize the said Company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water; to permit the holders of Waterworks bonds to convert them into stock, and to provide for the liquidation of the bonded and floating debt of the City of New Orleans.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That a corporation be, and the same is hereby created, to be styled "The New Orleans Waterworks Company," the capital stock whereof shall consist of two millions of dollars, which shall be divided into twenty thousand shares of one hundred dollars each.

SEC. 2. *Be it further enacted, etc.*, That immediately after the organization of the said Waterworks Company, as hereinafter provided, it shall be required to issue to the city of New Orleans, stock to the amount of six hundred and six thousand six hundred dollars, as full paid, and not subject to assessment; and in addition thereto, one similar share for every one hundred dollars of waterworks bonds which said city may have taken up heretofore and extinguished by payment, exchange or otherwise; and that the residue of said capital stock shall be reserved for the benefit of all holders of waterworks bonds, to the extent of the amount now outstanding who may elect to avail themselves of the provisions of this act; and the said Waterworks Company shall issue to the said city of New Orleans, to be exchanged with the holders of said bonds, one share of full paid stock not subject to assessment, for each and every one hundred dollars of said waterworks bonds; and the said bonds, as fast as surrendered and exchanged for stock, as aforesaid, be cancelled; that for the purpose of effecting said exchange of outstanding waterworks bonds for stock, as aforesaid, the city of New Orleans shall be entitled to all the certificates for the shares of said stock of said New Orleans Waterworks Company, and shall, by advertisement for six months in two newspapers in the city of New Orleans and two newspapers in the city of New York, give notice that it will exchange said stock at par for said waterworks bonds at par, exclusive of the overdue coupons attached to said bonds, which shall constitute a separate demand against said city, and in case any of the said bondholders shall fail or refuse to avail themselves of this act within one year from the formation of said company, the said city of New Orleans shall not thereafter be required to make said exchange, but may retain the unused shares of stock for its own account and benefit, unless it shall prefer to continue to take up any of said outstanding bonds by exchange as aforesaid.

SEC. 3. *Be it further enacted, etc.*, That the said Waterworks company shall be organized by the Mayor of the city, giving thirty days' notice that he will receive subscriptions of bondholders who may agree to exchange their bonds for stock as aforesaid: and the said city shall at once subscribe for stock to the amount of six hundred and six thousand six hundred dollars, and such further amount as shall equal the par value of any of said waterworks bonds which shall have been extinguished by said city; and as soon as, in addition to the subscription of said city, there shall be subscribers for an exchange of said bonds for stock to the extent of five hundred thousand dollars and the said amount of bonds shall have been actually surrendered to and cancelled by the Administrator of Finance, the said subscribers shall assemble together, on a day to be named by the Mayor, and shall elect a Board of Directors, to consist of seven persons, four of whom shall be designated by the Mayor, and the remaining three shall be elected by said subscribers, other than said city, from amongst themselves: and the persons thus designated and elected shall constitute the first Board of Directors and shall continue in office until the first of July, eighteen hundred and seventy-eight, and the said Board shall elect one of their number as President.

SEC. 4. *Be it further enacted, etc.*, That as soon after the election of said Board of Directors as the City Council may determine, the Mayor of the city shall transfer, by notarial act, to said New Orleans Waterworks Company, the waterworks and all the property appurtenant thereto.

SEC. 5. *Be it further enacted, etc.*, That the said Waterworks Company shall own and possess the privileges acquired by the city of New Orleans from the Commercial Bank; that it shall have for fifty years from the passage of this act the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, or any other stream or river, by means of pipes and conduits, and for erecting and constructing any necessary works or engines, or machines for that purpose; that it may contract for, purchase or lease any land or lots of ground, or the right to pass over and enter the same from time to time as occasion may require, through which it may be necessary to convey the water into said city, or to distribute the same to the inhabitants of said city; and to construct, dig, or cause to be opened, any canals or trenches whatsoever, for the conducting of the water of the rivers from any place or places it may deem fit, and to raise and construct such dykes, mounds, reservoirs, as may be required for securing and carrying a full supply of pure water to said city and its inhabitants; to enter upon and survey such lands as it may think proper, in order to ascertain the best mode of furnishing a supply of water; to lay and place any number of conduits or pipes, or aqueducts, and to cleanse and repair the same, through or over any of the lands or streets of the city of New Orleans;

*Provided*, the same shall not be an obstruction to commerce or free circulation; and also to have and use a common seal and alter the same at pleasure; to ordain and establish by-laws for its government and that of its officers and employes, not repugnant to this act and the Constitution of the State and of the United States, or the ordinances of the city of New Orleans.

SEC. 6. *Be it further enacted, etc.*, That on the first Monday of July, eighteen hundred and seventy-eight, and annually thereafter, an election for directors of said company, after ten days' notice of the same, and place of holding the same, shall be held, at which election there shall be elected four directors by all the stockholders other than the city of New Orleans; and the Mayor of the city, the Administrator of Waterworks and Public Buildings, and the Administrator of Finance of said city, shall be *ex officio* directors of said company; the said city, through its Mayor and Administrators, shall have the right to vote at the election of directors, and at all meetings of said stockholders, in the same manner as any other stockholders. That at all elections and all meetings of stockholders each share of stock shall be entitled to one vote. The directors elected shall serve for one year, and shall hold their offices until their successors are appointed; and no failure to elect directors at the time designated, shall prevent the Board of Directors from fixing another day for holding the election; and in case of vacancy in the Board of Directors, occasioned by death, resignation or absence from the State, or other cause, the Board of Directors may fill such vacancy for the remainder of the year.

SEC. 7. *Be it further enacted, etc*, That the stock owned by said city of New Orleans in said Waterworks Company, shall not be liable to seizure for the debts of said city.

SEC. 8. *Be it further enacted, etc.*, That the stock of said Waterworks Company may be increased to two millions of dollars, for the purpose of enabling said company to improve, enlarge and extend its works; *Provided*, that the new or increased stock shall be paid for in cash, or in work done for the company; and in case of non-payment of installments on stock subscribed for, the same may be forfeited to the use of said company.

SEC. 9. *Be it further enacted, etc.*, That the Board of Directors of said company shall have power, in addition to the authority to increase its capital stock, to borrow money for the purpose of improving and enlarging its works and increasing the supply of pure water; and to accomplish this purpose, the said Board of Directors are hereby authorized to issue the bonds of the company to an amount not exceeding two millions of dollars, in such sums, on such terms, and bearing such rate of interest as said board may determine, and the payment of said bonds, in principal and interest, may be secured by a mortgage of all the property and franchises of said company, including its franchise to be a corporation, and said mortgage may include the property and franchises of said company, acquired or to be acquired, and the registration of said mortgage in the office of the Recorder of Mort-

gages for the parish of Orleans, shall operate on the property and franchises of said company, wheresoever situated, and shall be and continue a valid and subsisting mortgage until the payment of the debt secured by it, without re-inscription; *Provided, however*, that no bond shall be issued, or mortgages given, without the consent of the Council of the city of New Orleans, and said bond shall not be sold or disposed of except on such terms as shall be approved by said Council of said city.

SEC. 10. *Be it further enacted, etc.*, That said company shall not declare or pay any dividends, except in cash, and then only out of the net semi-annual or annual receipts after payment of expenses of operation, and the interest on its bonded debt, nor shall any dividends be declared until the contemplated works are completed and in use.

SEC. 11. *Be it further enacted, etc.*, That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; and in consideration thereof the franchises and property of said New Orleans Waterworks Company, used in accordance with this act, shall be exempt from taxation—State, municipal and parochial.

SEC. 12. *Be it further enacted, etc.*, That the said Waterworks Company shall have the right in the city of New Orleans and its suburbs and adjoining lands, to use the streets and public places for the purpose of laying pipes and hydrants to run water; *Provided*, that said streets shall not be obstructed longer than necessary for such purpose, or for making repairs, and that said streets shall be restored to the same condition they were in as soon as practicable, by the said company, under the supervision of the City Surveyor. In case the said Waterworks Company shall require any lot of ground in the city of New Orleans, or any lot of ground or quantity of land situated in any parish of this State, for the purpose of constructing reservoirs or other works, or for the purpose of laying pipes to conduct water to the city of New Orleans, and shall not be able to agree with the proprietor or proprietors of said lot of ground or land, the said company shall have power to cause the same to be expropriated in

pursuance of the general laws on the subject of expropriation for works of public utility now in force, or which may hereafter be enacted and if the object of said company be merely to lay pipes through a piece of land or lot of ground, the expropriation shall be confined merely to the servitude it may require, and not to the rights of absolute ownership.

SEC. 13. *Be it further enacted, etc.*, That the said Waterworks Company, immediately after its organization, shall proceed to the erection of new works and pipes sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi river, or elsewhere, as may be judged most expedient; that said new works and pipes shall be commenced within twelve months from the passage of this act, and shall be year by year completed, so that, within five years from the date of this act, they shall be completed so as to give an adequate supply of water to the people of the city of New Orleans, exclusive of the Fifth District. If said work be not done as above prescribed, said corporation shall forfeit all exclusive privileges granted herein, and the city shall have a right to contract with any one else for a supply of water as above provided, and to expropriate the property of the corporation hereby created. After the completion of the new works and pipes, the said company shall, from time to time, as the wants of the population may require, and when the estimated revenue on the cost of such extension shall equal ten per centum, extend their works throughout the entire limits of the city and suburbs, and any future extension of said city; and any failure by said Waterworks Company to comply with this provision shall work a forfeiture of this charter.

SEC. 14 *Be it further enacted, etc.*, That the city of New Orleans, through its Council, shall have authority to apply the stock subscribed for by said city, as herein provided, to the reduction of the bonded or floating debt of the said city, on such terms of adjustment as may be agreed upon between the City Council and the holders of such bonded or floating debt; *Provided*, said stock shall not be sold at less than par, and that when sold for obligations of the city, it shall only be under sealed proposals, after not less than fifteen days' advertisement in two daily papers, to the bidder who shall offer said obligations at the most advantageous rate, the Council reserving the right to reject any and all bids.

SEC. 15. *Be it further enacted, etc.*, That the said Waterworks Company shall have the right to fix the rates of charges for water; *Provided*, that the net profits of the company shall not exceed 10 per cent. per annum, and shall publish sworn annual statements of its business and condition; and that the City Council shall have the power to appoint a committee of not less than five, who shall have access to the books of the said company, and make such extracts from the same as they may deem necessary; and in case the said profits shall exceed ten per cent., the City Council shall have the right to require said company to reduce the

price of water in such manner, and in such a proportion, that the profits shall never exceed the above named rates; *and, provided further*, that the rates charged shall never exceed those now paid by the city, and in case said company shall refuse compliance, the demand of said city may be enforced by a writ of mandamus.

SEC. 16. *Be it further enacted, etc.*, That if any person or persons shall obstruct the said company, their successors agents, workmen or servants, in conveying the said water into the said city and its suburbs, or shall change, alter, remove, injure or destroy any work, or part of a work, made by the said company, or cause to be made, for the purpose of introducing water into the city of New Orleans under the authority of this act; or, if any person shall alter, change, or pollute the water or stream which the said company shall hereafter introduce, or be preparing to introduce, such person or persons shall be indicted in the proper court for the trial of such offense, and being thereof convicted, shall be fined at the discretion of the court, according to the nature of the offense, and imprisoned for a term not exceeding seven years; such fine to be paid and applied to the use of said company.

SEC. 17. *Be it further enacted, etc.*, That until other works are constructed by which the present works may be dispensed with, the same shall remain under the control of the City Council, and the superintendence thereof remain in the hands of the Administrator of Waterworks and Public Buildings; but the said company shall be authorized to collect the revenues thereof and apply them to the expense of operating and extending the works. At the expiration of fifty years from the organization of the company, the city shall have a right to buy the works, conduits, pipes, etc., of the company, at a valuation to be fixed by five experts: two to be named by the city, two by the company, and the four to select the fifth expert; but should the city neglect or refuse to purchase said works, etc., as above provided, the charter of the company shall be *ipso facto* extended for fifty years longer, but without any exclusive privilege or right to supply water, according to the provisions of the charter.

SEC. 18. *Be it further enacted, etc.*, That nothing in this act shall be so construed as to prevent the City Council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own or their own use.

(Signed) LOUIS BUSH,
Speaker of the House of Representatives.
(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.
Approved March 31, 1877.
(Signed) FRANCIS T. NICHOLLS,
Governor of the State of Louisiana.

A true copy:
WILL A. STRONG,
Secretary of State.

Some of the provisions of this act being considered too stringent by the holders of the waterworks bonds, i. e., the bonds given by the city in 1869, to the Commercial Bank in payment of the purchase price, they were modified by a subsequent statute passed February 26th, 1878, and which is found in full on pages 14 and 15 of the record. The company was thereupon organized, and the waterworks transferred to it by the city. By ordinances of the City Council, No 4459, passed April 16th, 1878 (Record, pp. 41, 42), and No. 4586, passed July 2d, 1878 (Record, p. 42), the Council resolved to apply the stock subscribed for by the city under section 2 of the act No. 33 of 1877, to the retirement of the floating debt, as provided in section 14 of that act, and authorized the debt commissioners to advertise for sealed proposals for such exchange. As appears by the table on page 43 of the Record, seven thousand one hundred and fifteen shares of such stock were thus exchanged for $714,390 66 of the city's floating indebtedness, consisting of judgments, unpaid ordinances of various years, unpaid interest coupons, etc.

After these exchanges there still remained 4344 shares of such stock on the books of the company in the name of the city.

In this condition of affairs, John A. Morris, Freeman Clarke, Chas. T. Howard and John Klein, having obtained final judgments against the city of New Orleans in the United States Circuit Court for the District of Louisiana, on certain bonds issued by the city of New Orleans under legislative authority in 1854, or issued by the city of Jefferson in 1871, and assumed by the city of New Orleans by legislative authority in 1874, caused writs of *alias and pluries fi. fa.* to issue on said judgments, and caused the Marshal of the district, Jack Wharton, to levy on the above mentioned 4344 shares of stock, and to advertise the same for sale.

This seizure and advertisement were made on December 21st, 1878. On the 16th of January following, the city filed her bill against the Marshal and against all of these seizing creditors to restrain this sale. The bill sets up substantially the foregoing facts and then avers:

*1st.* That under the seventh section of the act No. 33 of 1877, creating the corporation, the stock owned by her therein was expressly exempted from seizure and sale.

*2d.* That the rights of the city in said company, represented by said stock, were, by their nature, public, and as such, not liable to seizure and sale.

*3d.* That by section 14 of said act No. 33, of 1877 (extra session), the said stock could not be disposed of except in the manner and for the purposes therein designated; that, under said section, the city held the stock in trust for her creditors; and that she could not be hindered or delayed in the performance of that trust by the unlawful sale about to be made by the defendants.

The application for a preliminary injunction was heard on the 22d and 23d of January (Record, pp. 43 and 46), on the bill and exhibits, and some additional documentary evidence. On February 8th, 1879 (Record, p. 44), while the case was still under advisement, on the application for the preliminary injunction, three of the defendants, Morris, Clark, and Klein, filed their joint and several pleas to the said bill as follows:

"These defendants, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged, to be true, in such manner and form as the same are therein and thereby set forth and alleged, for plea to the whole of said bill, say: That true it is, as in said bill averred, that these defendants, under the several judgments in their favor against the said city of New Orleans, in this court, specifically referred to in said bill, have caused writs of *fieri facias*, and *alias* and *plu ries* writs of *fieri facias* to be issued thereunder against the said city, and that said writs are now in the hands of the Marshal of this court, and that these defendants have caused to be seized under the said writs, for the purpose of having the same sold thereunder for the satisfaction of their respective judgments, certain stock in the New Orleans Waterworks Company held and owned by the said city, which stock is specifically described in the bill.

And these defendants say that the respective judgments in their favor against the said city, referred to in the bill, were all recovered upon obligations of said city antecedent in date to the passage of act number thirty-three of the extra session of the

General Assembly of the State of Louisiana of 1877, which act was approved March 31st, 1877, under the provisions of which act it is claimed in the bill the said stock of the city of New Orleans in the said Waterworks Company is exempt from seizure for antecedent debts of said city.

These defendants are advised, and therefore aver, AS MATTER OF LAW, that under the laws of the State of Louisiana, which were in force when the respective debts for which they have recovered judgment were incurred, and under the laws of said State now in force, except as they may have been validly and constitutionally modified by the provisions of said Act No. 33, of 1877, the said stock of the said city in the said Waterworks Company, was and is liable to be seized and sold under execution to satisfy the respective judgments of these defendants against said city; and these defendants are further advised, and therefore aver, as MATTER OF LAW, that the said provisions of said Act No. 33 of the extra session of 1877, set up and relied upon in the bill as exempting the said property from liability to be seized and sold, to satisfy the said respective judgments of those defendants, are, in so far as they are intended to apply to debts of said city, antecedent in date to the passage of said act, as were the debts due by the said city to these defendants, upon which their said respective judgments were recovered, and in so far as it may be the intent of the said provisions of said act, in any way to derogate from, impair, or obstruct the right of these defendants to enforce their said respective judgments by the seizure and sale under execution of the said stock of the said city, are null and void, and entitled to no force, effect, or operation whatever, by reason of their repugnancy, alike to the Constitution of the State of Louisiana, and to the Constitution of the United States; that, by article 110 of the Constitution of the State, the Legislature of the State is forbidden and disabled from passing any retroactive law, or any law impairing the obligation of contracts; and that, by the tenth section of the first Article of the Constitution of the United States, the States are forbidden to pass any law impairing the obligation of contracts.

And these defendants further say that the operation and effect of the said provisions of said Act No. 33, so set up and relied upon in said bill, if allowed to have the operation and effect claimed for them, will very seriously impair the obligation of their respective contracts, and materially obstruct, if it does not entirely prevent, their enforcement by execution.

These defendants say that the property of said city, so claimed, in said bill, to have been exempted from liability for the antecedent debts of said city by said Act 33 of 1877, is of very large value; that the valuation put upon it by the statute itself is over a million dollars, and the actual and real value of it is over three hundred thousand dollars. And these defendants further say that they are not aware of the ownership by the said

city, nor have they been able to discover the ownership by it of any other property liable for seizure for its debts, sufficient to satisfy to any material extent their respective judgments against the said city; and that if the effect and operation are allowed to said Act No. 33 of 1877, that are claimed for it in the bill, the result will be that defendants will not only be greatly obstructed in enforcing the remedy to which they were entitled by the laws in force when the debts were contracted, but will be prevented from collecting their debt at all to any material extent."

On the 7th of April, 1879, Chas. T. Howard, one of the other defendants, filed a general demurrer to the bill. Jack Wharton, the Marshal, never made any appearance at all.

On April 15th (R. p. 48), there appears the following entry in the minutes:

"And now on this day, in open court, came and appeared Joseph P. Hornor, Esq., of the firm of Hornor & Benedict, and formally withdraws the demurrer heretofore filed, and adopts the plea filed on behalf of the defendants, represented by Kelly & Lazarus and Thomas & Lewis. And thereupon, the counsel for the city of New Orleans and for the defendants being present, the cause was submitted to the court for decision."

On the same day, to-wit: April 15th, 1879, the court *rendered and signed* the following decree, (R. p. 48):

"This cause came on to be heard at this term, and was argued by counsel, and thereupon, on consideration thereof, it was ordered, adjudged and decreed as follows, viz: that the pleas of the defendants to the bill of complaint be maintained, that the injunction applied for be denied, and the bill be dismissed, and that complainants pay costs of suit to be taxed."

From this decree, complainant applied on the following day, April 16th, for an appeal to operate as a *supersedeas*. An appeal was granted on the 24th (R. p. 51), but the motion that it have effect as a *supersedeas* was denied.

In order to explain the apparent anomaly of the submission and decree of the 15th of April, and the absence of all orders in the chancery order book, setting these pleas down for hearing, it is necessary to state a few facts which do not appear of record.

On the morning of April 15th, the judge, who had had the application for the preliminary writ under advisement since January 23d, rendered an oral decision refusing the injunction.

Thereupon, as the pleas filed by the defendants, presented, as a question of law, their only reason and justification of this seizure, the case was submitted to the court as if upon the sufficiency of those pleas, with the immediate result above stated.

The order of submission does not show whether the plea was submitted on an issue of fact or of law, but the defect has been remedied by a stipulation filed in this court to the effect that the sufficiency of the plea was alone at issue.

## ASSIGNMENT OF ERROR.

I.

The Circuit Court erred in sustaining the defendants' pleas.

II.

The court erred in dismissing the complainant's bill.

## POINTS OF LAW.

I.

The careful attention of the court is called to the language of the plea quoted above.

It first avers, that the the obligations underlying the judgments, under which the writs issued, were contracted by the city *prior to the passage of Act No. 33, of 1877.* (Extra session). This being an averment of fact is to be taken as true.

It then avers that, AS A MATTER OF LAW, under the laws of the State in force at the time of the contracting of said obligations, and under said laws now in force (except said Act No. 33), said stock of the city in said waterworks was and is liable to be seized and sold under execution to satisfy their judgments. This being an averment of law and not of fact, is not admitted.

It then avers, AS A MATTER OF LAW, that the seventh section of the said Act No. 33, of 1877, which exempts the stock of the city from seizure and sale, is as against antecedent contract creditors null and void, because in contravention of the Constitution of the State and of the tenth section of the first article of the Constitution of the United States. This, also, being an averment of law, it is not admitted.

There are two other averments in the plea which may be considered, and were, doubtless, intended as adjuvatory of the above issue of law. They are, that the provisions of said Act No. 33 will, if allowed to have effect, very seriously impair the obligation of their contracts, by obstructing and preventing their enforcement by execution; that this property, so exempted from execution, is actually worth $300.000; and that defendants have been unable to find any other property owned by the city and liable to execution.

This plea is utterly vicious, and should not have imposed upon the understanding of a tyro. It does not aver when the contracts, whose obligation it is claimed is impaired by Act No. 33, of 1877, were entered into by the city, whether subsequent to 1870, when the waterworks were made one of the municipal arms of the government, or prior to that date, at the time when the waterworks were owned by the now extinct Commercial Bank. As a matter of fact, shown by the exhibits offered on the trial of the application for an injunction, some of those contracts arose in one period and some in the other, *i. e.*, some in 1854 and some in 1874. As we shall see, it makes no difference in which of these periods the contracts were made.

Prior to their purchase in 1869 by the city, the waterworks belonged to the Commerdial Bank. The city was only a stockholder in that bank. That stock was not liable to seizure by the creditors of the city. A moment's examination and reflection will demonstrate this.

In American cities, where four-fifths of the structures are of wood, where the climate is exceedingly dry, and where high winds prevail throughout a large portion of the year, waterworks are an absolute necessity. By their very nature, and by the necessity for their existence, these works fall under the exercise of the police power; and any municipal government under a general grant of police power would have authority to establish and maintain waterworks.

Rome vs. Cabot, 28 Ga. 350.
Hale vs. Haughton, 8 Mich. 458.
Livingston vs. Pippin, 31 Ala. 542.
Wells vs. Atlanta, 43 Ga. 67.

Waterworks may, therefore, be considered one of the legitimate and necessary instrumentalities of municipal government.

Now, the exercise and management of this instrumentality may be entrusted by the Legislature either to the municipal corporation itself, or to some private corporation. The power of a government to establish private corporations to enable it properly to exercise its various functions, cannot be questioned.

McCulloch vs. Maryland, 4 Wheaton, 317.

It may even entrust to such a corporation a portion of its police power.

Slaughterhouse Cases, 16 Wall. 64.

It was just such a corporation as this that was established by the Legislature of Louisiana on April 1st, 1833, under the name of the Commercial Bank. Up to that time the city was operating her own waterworks, and it was provided by sections 44 and 45 of the charter of the Commercial Bank that it should purchase those works from the city.

The fact, however, being recognized that the franchises of this corporation properly belonged to the government of the city, it was provided that, at the expiration of thirty-five years, the city should have the right to purchase at an appraised value the waterworks erected by the company. Furthermore, in order to give the city a voice in the control and management of the affairs of this corporation, she was given the right to subscribe for five thousand shares of the capital stock. (Sec. 21). She was to pay for this stock in her own bonds, bearing five per cent. interest, and having forty years to run. (Ib.) On this stock she was not to vote, but, by virtue of her ownership thereof, she was to elect two out of the thirteen directors. (Sec. 22). Nor was she even to draw any dividends on this stock, but the dividends accruing on it were to be retained by the corporation, and applied, 1st, to the payment of the interest due on the bonds given by the city in payment therefor, and, 2d, the surplus was

to be set apart as a sinking fund, "applicable alone to the payment of the bonds of the city" when they were due. (Sec. 23). On this sinking fund, thus held by the corporation, it was to pay the city five per cent. per annum interest. (Ib.)

The subscription by the city to this 5000 shares and her perpetual right to nominate two of the directors, were part of the organism of the corporation. There is no provision in this act, expressed or implied, allowing the city ever to dispose of this stock. On the contrary, it is impossible to read the act without coming to the conclusion that it was never contemplated that the city should have the power of alienating the stock, or that it could ever be alienated by seizure and sale on the part of her creditors. It was essentially out of commerce. It could not be voted on. No dividends could ever accrue thereon. It could no more be taken away from the city than her correlative right to elect two directors of the company.

This prohibition against forced alienation is none the less emphatic, because it is implicit, and not expressed. It results from the character of the functions performed by the corporation in which the stock existed, and from the peculiar provisions in the charter with reference thereto.

In this connection, see Foster vs. Fowler, 60 Pa. St. 27, where it was decided that even the creditors of a waterworks company could not seize and sell its property, i. e., that it was a public corporation, and that its creditors could not by seizure and sale be allowed to disturb it.

But even if all this were not correct in law, and even if the stock owned by the city in the Commercial Bank was seizable by her creditors, yet the position of the defendants is nowise bettered.

The Act of 1877, complained of in the plea, not only did not, but could not, operate on the stock owned by the city in the Commercial Bank. *That stock had been dead for more than eight years when the Act of 1877 was passed. The stock which it purported to act upon and to exempt from seizure was stock in an entirely different corporation. It was stock which was created by that act itself.*

The corporation which was formed in 1833 became extinct by virtue of the purchase made of its property by the city, under the provisions of its charter. All stock in that corporation died a natural death by that purchase in January, 1869. By that act of purchase the city rose from the position of a mere stockholder to that of owner of all the corporate property and all the corporate franchises; and that act of purchase was of itself sufficient to make all the property so purchased inalienable, and to put it beyond the reach of her creditors. She thereby resumed complete control of one of the necessary instrumentalities of her government, of which she had heretofore had only a modified control, and of which complete control she had been only *temporarily* deprived. This resumption of complete control was brought about by the provisions of the same act which had sus pended her functions in this regard.

We say that this purchase was of itself sufficient to take the property purchased out of commerce. This is obvious, for the reason that any property bought for a public purpose, and used for a public purpose, is, necessarily, out of commerce. But, if there could have been any doubt on this subject, that doubt was laid at rest by the city charter of 1870, which incorporated the waterworks into, and made them a branch of, the municipal government. No one will be so bold as to advance the legal heresy that the waterworks were seizable after the passage of that act.

Even if it should be admitted that prior to this act the property was in commerce and liable to seizure, and objection should be raised to the taking of it out of commerce, the answer is found in the principle that all property, subject to private ownership, belonging to a municipal corporation, may, if the exigencies of the public good require it, lose its character of private, and assume the character of public property.

Everyone who deals with a municipal corporation, must be held to have dealt with it with full knowledge of this principle.

That which is a vacant lot to-day, of no use to the public, may, at the option of the government, become the site of a public building, a public cemetery, a public square, or a public highway.

Under the provisions of this charter of 1870—the very charter under which the city now exists and performs her governmental functions—she administered the waterworks for nearly a decade.

Moved, however, by a variety of considerations, the Legislature, in 1877, concluded to take the administration of the waterworks away from the city, and commit them to a corporation similar in its nature to the Commercial Bank. Thereupon Act No. 33, of the extra session of 1877, was passed. It is unnecessary to recite its provisions here. Suffice it to say, that a new corporation was to be organized, in which the holders of the bonds of the city, known as the waterworks bonds, and the city herself, were to be the stockholders To this corporation the city was to transfer, by notarial act, all the property by her purchased in 1869, and the consideration for that transfer was to be her ownership of 6660 shares of full paid stock, plus one additional share for every waterworks bond by her previously taken up, either by payment or by exchange for new bonds. Under these provisions of the act, there were allotted to the city, on the organization of the corporation, something over 12.000 of the 20,000 shares of the capital stock A mere statement of these statutory provisions is a demonstration of the preposterous nature of the plea.

The only state of facts on which any such legal question as that propounded by the plea could arise, would be this:

THAT THE STOCK SEIZED BY THE DEFENDANTS IN THIS CASE, IS IDENTICALLY THE SAME STOCK WHICH WAS IN EXISTENCE WHEN THE CONTRACTS WERE MADE; THAT AT THAT TIME THE STOCK WAS LIABLE TO SEIZURE, AND THAT BY THE SEVENTH SECTION OF THE ACT OF 1877, IT WAS EXEMPTED FROM SEIZURE.

Such a state of facts is not averred by the plea. If it had, we would have replied to it. No such state of facts ever existed. None such could, therefore, have been verified by the oath of the defendants and the certificate of their counsel.

Even if we should give wings to our imagination, and suppose that the new corporation, organized in 1877, under the act complained of, and known as the Waterworks Company, was the extinct Commercial Bank *resurrected*, and that the stock seized in this case was the identical stock (also *resurrected*) owned by the city in that corporation, and that that stock, when in existence, was liable to seizure *at defendant's hands*, it would not help the defendants towards the maintenance of their plea.

The Legislature, which alone had the power to bring about this resurrection, had the power and the right to impose thereon whatever conditions and limitations it might choose to impose. In this case (assuming the above absurd statement of the identity of the corporations and the stock to be true), the Legislature chose to declare that the resurrected stock should not be liable to seizure and sale for the debts of the city of New Orleans. The propriety and justice of this limitation is apparent. The waterworks when owned by the city, after the death of the Commercial Bank, were out of commerce, non-seizable and non-alienable. The Legislature thought it advisable to transform this non-seizable property into non seizable stock in a corporatton to which the property was transferred. Who, now, can complain of this transformation?

What creditor of the city has had a single right taken from him by this act, which he had before the act was passed? Suppose the Act of 1877 had never been passed? What then? The answer is plain. THERE WOULD NOT HAVE BEEN ANY STOCK TO SEIZE. There would not have been any Waterworks Company. The city would have continued to administer the waterworks under her charter as one of the arms of the municipal government. As such they were not seizable.

The Legislature was under no obligation, expressed or implied, constitutional or otherwise, ever again to cut off the right of the city to administer this property directly and immediately through her own municipal officers, or ever again to bring this property into commerce. *A fortiori*, it was under no obligation

of any kind, if it should choose to bring it into commerce, to bring it in without conditions and limitations - i. e., in such a manner that all the creditors of the city should fall upon it and seize it. It follows, therefore, as an irresistible conclusion, that when the Legislature did choose to bring this property into commerce again (admitting that it was once in commerce), it had the right and the power to bring it in either wholly or partially, either absolutely or conditionally. It had the right and the power to say how, when, on what terms, under what conditions and for what purposes the city should dispose of this property. The organization of a new company and the transfer of the property to it, are not, and cannot be complained of. The transformation of the city's right of property in these works into stock in this corporation is not, and cannot be complained of. How, then, is it possible to say that the terms and conditions which the Legislature has imposed upon the alienation of this stock, violate any right, impair the obligation of any contract, or abate in one jot or one tittle the privileges of any one of the creditors of the city of New Orleans, no matter when their rights arose?

## II.

Let us assume, for the sake of argument, that the plea can be held to aver the state of facts above formulated as absolutely necessary to give rise even to the semblance of a claim that the Act of 1877 impairs the obligation of the defendants' contracts, to-wit: *That the stock seized by the defendants in this case is identically the same stock which was in existence when their contracts were made; that at that time the stock was liable to seizure, and that by the 7th Section of the Act No. 33, of 1877, it was exempted from seizure.*

Would such an exemption violate the obligation of the defendant's contracts?

In answer to this question we shall discuss a very much broader proposition, which, if true, necessarily carries with it a negative answer to the question propounded. It is this:

"Where a creditor can proceed against a municipal corporation by *fi. fa.*, does it impair the obligation of his contract for the Legislature to abolish the remedy by *fi. fa.*, *provided* it leaves the creditor with the remedy by mandamus to enforce the levy and collection of taxes to pay his judgment?" If it is true that the Legislature can destroy the right of a creditor to proceed by *fi. fa.* against any and all of the property of the municipality, it is, *a fortiori*, true that it can prohibit him from seizing and selling a single piece of property belonging to the corporation.

It has long been the settled doctrine of this court that while a remedy is an essential and vital portion of a contract, yet the form of the remedy is immaterial, and is always under the control of the Legislature, subject to the *proviso* that no *substantial* right can be affected by a change of the remedy. Green vs. Biddle, 8 Wh. 1; Bronson vs. Kenzie, 1 Howard, 311; McCracken vs. Hayward, 2 Id. 608; Planters' Bank vs. Sharp, 6 How. 301; Von Hoffman vs. Quincy, 4 Wall. 535; White vs. Hart, 13 Id. 653; Gunn vs. Barry, 15 Id. 622; Walker vs. Whitehead, 16 Id. 314; Tennessee vs. Sneed, 96 U. S. 69; Edwards vs. Kearzey, Id. 607; Memphis vs. United States, 97 U. S. 295.

This court said in Von Hoffman vs. Quincy:

"No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair *substantial* rights. *Every cause must be determined upon its own circumstances.*"

In *Tennessee vs. Sneed, supra*, this court said:

"If a particular form of proceeding is prohibited and another is left or provided, which affords an *effective and reasonable mode* of enforcing the right, the obligation of the contract is not impaired."

The question which then presents itself for solution is, whether a proceeding by mandamus to compel a municipal corporation to levy and collect taxes to pay a judgment, is an effective and reasonable mode of execution.

At common law, and in the absence of a special statute authorizing a *fi. fa.* against a municipal corporation, such a mode of execution is not allowable.

Chicago vs. Hasley, 25 Ill. 595.

In many of the States mandamus is the only remedy allowed against such corporations.

Crave vs. Fond du Lac, 16 Wis. 196.
Chicago vs. Hasley, 25 Ill. 595.
Commonwealth vs. Alleghany Co., 37 Pa. St. 277, 290.
Commonwealth vs. Perkins, 43 Pa. St. 400.
State vs. Milwaukee, 20 Wis. 87.
State vs. Beloit, Ib. 79.

Mandamus is the appropriate and efficient remedy to enforce the payment of the judgments of the Federal courts against such corporations.

Supervisors vs. United States, 4 Wall. 435.
Coy vs. Lyons, 17 Iowa, 1.
Olney vs. Harvey, 50 Ill. 453.
Frank vs. San Francisco, 21 Cal. 668.
Schaffer vs. Cadwallader, 36 Pa. St. 126.
Galena vs. Amy, 5 Wall. 705.
Von Hoffman vs. Quincy, 4 Wall. 535.
Riggs vs. Johnson Co., 6 Wall. 166.
Weber vs. Lee Co., Ib. 210.
United States vs. Keokuk, Ib. 514.
State vs. Hug, 44 Mo. 116.
State vs. Milwaukee, 20 Wis. 87.
State vs. Beloit, 20 Wis. 79.
Watertown vs. Cady, 20 Wis. 501.

This is peculiarly the case where the judgments are based on bonds issued by legislative authority, and for the payment of which the power of taxation is directed to be exercised, either expressly or by necessary implication.

Von Hoffman vs. Quincy, 4 Wall. 535.
Walkley vs. Muscatine, 6 Wall. 481.

Commonwealth vs. Pittsburg, 34 Pa. St. 496.
State vs. Commissioners, 6 Ohio St. 280.
Flagg vs. Palmyra, 33 Mo. 440.
Commonwealth vs. Alleghany Co., 37 Pa. St. 277.
Maddox vs. Graham, 2 Met. (Ky.) 56.
Supervisors vs. United States, 4 Wall. 435.
Riggs vs. Johnson Co., 6 Wall. 166.
Knox Co. vs Aspinwall, 24 How. 384.
Mayor vs. Lord, 9 Wall. 409.
Supervisors vs. Durant, Ib. 415.

Such corporations rarely have any property that is liable to seizure and sale under execution. Their only mode of paying debts is by the exercise of the taxing power, and it is with reference to this power that creditors are supposed, and, indeed, presumed, to contract with them.

Von Hoffman vs. Quincy, 4 Wall. 535.
U. S. vs. New Orleans, 98 U. S. 381.
Wolf vs. New Orleans, 103 U. S. 358.

The writ of mandamus to enforce the exercise of the taxing power to pay a judgment, is process in execution, and has always been found ample for that purpose.

Memphis vs. Brown, 97 U. S. 302.

There might be supposed a special case where a municipal corporation, with a very large amount of private property liable to execution, and more than sufficient to pay its debts, has so limited a power of taxation as to make the exercise of that power, even through a long series of years, insufficient for that purpose. In such case, a statute prohibiting the seizure and sale of the private property, and relegating the creditor to the insufficient taxing power, would be properly held to impair the obligation of contracts.

The converse of this proposition is equally true. Where a municipal corporation has ample powers of taxation, and little

or no property liable to seizure, a statute prohibiting mandamus and confining the creditor to a remedy by execution, would equally impair the obligation of contracts

But in this last case it could not be held that the prohibition of the use of a *fi. fa.* against such a corporation, would impair or "lessen the value" of the creditor's contract. The remedy by mandamus, which the law has left him, is ample to obtain payment of his judgment.

Now, this case last put is identically the case at bar. The plea specially avers that the city has no other property liable to execution but the stock seized in this case valued at $300,000.

As a matter of law, these defendants had ample and complete remedy by mandamus to compel the levy and collection of taxes to pay their judgments.

The taxing power of the city for that purpose is ample and even unlimited.

All of this has been specially declared and decided in this Honorable Court against the city of New Orleans, in cases where the judgments were based on obligations identical with those on which the defendants' judgments rest.

United States vs. New Orleans, *supra.*

Wolf vs. New Orleans, *supra.*

Therefore, we conclude that in order to sustain the validity of this plea, even under the extreme, untrue and UNAVERRED state of facts above set forth, it will be necessary to hold this proposition:

"*That the exemption from seizure and sale of a single piece of property, worth $300,000, belonging to a municipal corporation, with an assessment roll of over $100,000,000, impairs the obligation of the contract of a creditor who has the right to compel that corporation by mandamus to levy and collect unlimited taxes to pay his debt.*"

The mere statement of such a proposition is its own confutation.

The defendants attempt to assimilate this case to that large class of cases where the courts have declared that "exemption"

or "homestead" laws which withdraw from seizure and sale property of an *individual* debtor, violate the obligation of antecedent contracts.

The distinction between the situation of an individual and the situation of a municipal corporation, as to the payment of debt, is broad and manifest.

An individual has no means of paying his debts except by the accumulation of tangible property. To say, therefore, that his property shall not be seized to pay his debts, is virtually to say that his debts shall not be paid. The value of contracts made with the debtor, prior to the passage of such laws, is thus not only impaired but destroyed.

A municipal corporation, on the contrary, as a rule, has no tangible property with which to satisfy its creditors. Its debt paying power is lodged in its right to levy and collect taxes. As long as this right is left undiminished, its debt paying power is unimpaired.

While, therefore, the exemption of any material portion of the property of an individual from seizure and sale, would necessarily affect the value of antecedent contracts with him, because cutting off the creditor from the *only* source from which payment could be obtained, yet such exemption would not materially affect the rights of the creditors of a municipal corporation, because the power of taxation, the principal—and in many cases —the only source of payment, could still be sought by them.

However, the essential conditions upon which all of the "homestead" cases have ever turned, is that the property exempted from seizure should have been liable to seizure, before the act of exemption was passed. Previous liability to seizure is the *sine qua non* of complaint on the part of an antecedent contract creditor.

It follows, therefore, that if the exempted property was not liable to seizure at the time the debt was made, whether under general or special laws, a further and subsequent exemption, does not fall within the rule.

And here we again invoke the conclusion of law reached above—that at no time prior to the passage of Act No. 33, of 1877, were the rights of the city in the waterworks liable to seizure, neither her rights as a stockholder in the Commercial Bank, nor her rights as owner and administrator of the whole works for the benefit of the public. The essential condition, therefore, of previous liability to seizure being wanting, the position of the defendants is untenable.

III.

We have discussed above, incidentally, and with sufficient detail, the point made in the bill, that the stock owned by the city in this corporation is held for a public purpose, and therefore not liable to seizure, under general principles of law, apart from the express exemption in the seventh section.

IV.

It is manifest that the plea of the defendants is no sufficient answer to that portion of the complainants' bill, which avers that, under the 14th section of the Act of 1877, the city is constituted the trustee of said stock, for the benefit of her creditors, and that she was then administering said trust for their benefit, and applying the stock to the payment of their debts, and that the defendants could not be allowed to divert the whole of said trust property to their own use and benefit, and to the wrong and injury of the other *cestui que trusts*.

In converting and transforming the property of the city in the waterworks into stock in the new corporation created by the Act No. 33, of 1877, the Legislature plainly declares that this stock shall be used for no other purpose but the retirement of the bonded and floating debt of the city. It gives the city power to determine whether it shall go to the one or the other class of the debt, and imposes terms and conditions upon the exchange of the stock for the outstanding debt. These conditions could not be violated. They enter into the organization and constitution of the stock itself; they are congenital modifications of its

structure; they are womb-marks upon the body of every share of stock owned by the city in that company.

Who has the right to call in question the power of the creator of this stock to fashion it after his own will? When, where, and how did that right of dictation arise? What is its source? What its foundation?

We have never been able to find an answer to any of these questions. We have never heard one suggested even. We are convinced that the search of this great tribunal for such an answer, will be as futile as ours has been.

V.

Even if the court should come to the conclusion—manifestly an impossible one—that the defendants' plea avers the untrue state of facts assumed above in No. II, and that, from that point of view, the plea is sufficient in law, still it must reverse the decree in this case, and remand the cause to enable us to reply to this plea. The plea being heard, as if upon its sufficiency, if the court below found it sufficient, the complainant had a right to put it at issue, and to have the truth of the facts ayerred determined. On such hearing of the sufficiency of the plea it was a palpable error for the court, on finding the plea sufficient, to enter a decree dismissing the bill. On this branch of the case, it it only necessary to refer to Daniels' Ch. Pl. and Pr. p. *697.

We respectfully insist, that the court below was in error in refusing the injunction, in sustaining the plea, and in dismissing finally the conplainant's bill, and that such a decree cannot be allowed to stand.

All of which is respectfully submitted,

E. HOWARD McCALEB,

Of Counsel for Complainant and Appellant.

# APPENDIX.

## Act Approved March 5th, 1842.

Sec. 7. "That any bank, voluntarily or otherwise, entering into liquidation under this act, on its passage, or any time thereafter, shall be relieved from the payment of any bonus to the State or corporations not yet due, or from the further performance of any public work and improvement not yet completed, imposed by its charter, provided that this privilege shall not apply to any bank in which the State is a stockholder, or for the debts or obligations of which the State is liable; *provided*, that this clause shall not be considered as releasing any bank which may have constructed any public work or improvement, from the obligation, of surrendering up the same at the time, and on the conditions fixed by its charter to the State, or to any corporation, as provided by its charter. In case such bank shall, in comformity with its charter, have constructed and completed any public works or improvements, such bank may retain its corporate powers and all other privileges conferred by its charter so far only as the continuance of such powers and privileges may be necessary to enable it to retain the property in such works and improvements, and to manage and carry on the same until the termination of the period fixed by its charter; *provided*, that as regards the Gas Light and Banking Company, the time shall not extend beyond forty years from the date of its charter," etc. * * * * * *

## NEW CITY CHARTER.

## Act Approved March 16th, 1870.

Sect. 4. *Be it further enacted, etc.*, That the government of the city of New Orleans and the administration of its affairs, shall be vested in a Mayor and seven Administrators, to-wit: one of Finance, one of Commerce, one of Improvements, one of Assessments, one of Police, one of Public Accounts and one of the Waterworks and Public Buildings, with administrative and executive functions; and said Mayor and Administrators shall be appointed or elected as hereinafter provided, and shall form the council of the city of New Orleans. * *

Sec. 9. *Be it further enacted, etc.*, That in the administration of the government and affairs of the city there shall be, in addition and subordinate to the executive powers of the Mayor, seven separate departments, the heads of which shall be known

as the administrators of said departments, and shall have the administration and especial control of the same, subject to the limitations imposed by this act or other laws, or the ordinances and resolutions of the council, to-wit:

* * * * * * * * *

*Seventh.* A department of Waterworks and Public Buildings, which shall have general superintendence of the waterworks, school houses, hospital, asylums, and shall be vested with such other functions and duties as may be prescribed by the council.

## AN ACT

To incorporate the Commercial Bank of New Orleans.

WHEREAS, Sundry inhabitants of the city of New Orleans have petitioned this General Assembly, setting forth that they are desirous of establishing a company in the city of New Orleans, invested with banking privileges, and to be entitled the "Commercial Bank of New Orleans," the chief object of which said company, is to be the conveying of water from the river into the city of New Orleans and its faubourgs, and into the houses of its inhabitants. *And whereas*, the said object will greatly contribute to the security of the said city from fire, and to the health and convenience of the inhabitants, and the agricultural and commercial interests of this State may be greatly promoted by extending to said company the privileges required, therefore.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened.* That a company shall be established in the city of New Orleans, the original capital stock whereof shall be three million of dollars, and shall be divided into thirty thousand shares, of one hundred dollars each; and that subscriptions towards constituting the said stock shall, on the first Monday of April next, or as soon thereafter as the thirty days' notice required in the second section will allow, be opened in the city of New Orleans, under the superintendence of seven commissioners, five to be appointed by the Governor and Senate, and two by the City Council of New Orleans, and that a majority of said commissioners shall be sufficient to perform the duties of their appointment; and that they shall keep the subscription open for at least the term of thirty days, from ten o'clock A. M. until two o'clock P. M. of each day; and if not completed at the expiration of said term of thirty days, then they shall continue the same open for the term of thirty additional days, unless sooner completed; but after the expiration of the first term of thirty days, the subscription shall be closed as soon as the full number of shares allowed by this act, shall have been subscribed; and in the event of any excess of subscriptions, during the first term of thirty days aforesaid, it shall be the duty of the commissioners, or a

majority of them, to reduce the subscriptions to the number of thirty thousand shares from these having the greatest number, in such manner that no one subscription shall be reduced whilst any other remains larger.

SEC. 4. *Be it further enacted, etc.* That all such persons as shall become subscribers to said company, their successors and assigns, shall be and are hereby created and made a corporation and body politic, by the name and style of the Commercial Bank of New Orleans, and by that name shall be and are hereby made capable in law, to have, hold, purchase, to receive in payment of debts, possess enjoy, and retain, to them and their successors, property and estate of what nature, kind, or quality soever, or so far as is necessary to carry into complete effect the object of this charter, which is declared to be the furnishing of the city with good and wholesome water; and the same to alien, transfer and dispose of, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in any court or courts of record, or other place whatsoever; to have forever the exclusive privilege, from and after the passing of this act, of supplying the city and inhabitants of New Orleans and its faubourgs, with water from the river Mississippi, by means of pipes or conduits; and for erecting constructing, or working of any necessary engine; and they may contract for, purchase or lease, the right to enter and pass through, from time to time, as occasion may require, any lands or grounds through which they may deem it necessary to convey the said water into said city and its faubourgs; and to construct, dig, or cause to be opened, any canals or trenches whatsoever, for the conducting of the water of the river from any place or places that they may deem fit, and to raise and construct such dykes, mounds, or reservoirs, as they may judge proper, for securing and conveying such supply of water, as aforesaid, to the said city and the faubourgs thereof; and to survey such lands as they may think proper, in order to ascertain the best mode of furnishing such supply, and to lay and place any number of conduits, pipes and acqueducts, and to cleanse or repair the same, through or over any of the lands or streets of the city of New Orleans and its faubourgs; and also to have and use a common seal, and the same to break, alter and renew at pleasure: and also, through their president and directors, to ordain, establish, and put in execution, such by-laws, ordinances, and regulations, as shall seem necessary and convenient for the government of said corporation, not being contrary to this act, nor to the constitution and laws of the United States, or of this State, or ordinances of the city council of New Orleans; and generally, to do and execute all such acts, matters and things, as to them shall or may appertain to do; subject, nevertheless, to the rules, regulations, restrictions, limitations and provisions hereinafter specified and declared; *provided, however*, that at any time after the expiration of thirty-five years from the passage of this act, it shall be lawful for the corporation of the city of New Orleans to

purchase from the Commercial Bank of New Orleans the waterworks constructed by said company in virtue of said act—and said company shall not refuse to sell the works aforesaid, with all the rights and privileges appertaining to the same, on the terms hereinafter provided.

SEC. 11. *Be it further enacted, etc.*, That said company shall, within twelve months after the first election of directors, commence works, and commence to procure such materials as may be necessary to enable them to furnish the inhabitants of the city of New Orleans and its faubourgs, with sufficient water from the river at all seasons of the year; and in order that the true intent and meaning of this act be strictly adhered to and complied with, and that the waterworks contemplated to be constructed by said company, be completed in the shortest time practicable, under all the circumstances, the sum of at least one hundred thousand dollars shall be expended on the works aforesaid, annually, until the said company is in a situation to supply, and actually do supply, water to the greater part of the streets of the city proper, and the principal and most populous streets of the faubourgs—said expenditure to commence within one year after the passage of this act—so that the city of New Orleans and the faubourgs thereof, may be furnished with water in the streets, and such inhabitants may procure it by means of conduits or pipes, within their houses and lots, at a price to be regulated by the company: and should the said company fail or neglect either to commence or continue said works as aforesaid, then, and in such case, the charter now granted shall be wholly null and void. *Provided, however*, that the net profits on the same shall not exceed an interest of fifteen per centum per annum from the time of disbursements on said works; and at such times as dividends shall be declared by the bank, say semi-annually, the interest on the sum expended in constructing said waterworks, shall be added thereto, and shall form a part of the capital invested until the net revenues of said works amount to fifteen per centum as aforesaid; *and provided also*, that the City Council of New Orleans shall have the power annually to appoint a committee, who shall have access to such of the books of said bank, as relate to the said Waterworks Company, and may make such extracts from the same, as they may think necessary; *and provided further*, that at the end of five years after the first appropriation the said net profits shall not exceed ten per cent. —and in case said profits should exceed fifteen per centum during the first five years, and ten per centum afterwards, as provided for in this section, the City Council shall have the power to reduce the price of water in such a manner and in such a proportion, that the profits should never exceed the above mentioned rates.

SEC. 21. *Be it further enacted, etc.*, That within the first thirty days that the books are opened for subscription, the corporation of the city of New Orleans may subscribe for five thousand

shares of the capital stock of said company, not subject to deduction; and for which the said company may receive the bonds of the Mayor, Aldermen and inhabitants of New Orleans, redeemable in forty years, bearing an interest not exceeding five per centum per annum, payable half yearly.

SEC. 22. *Be it further enacted, etc.*, That if, agreeable to the twenty-first section of this act, the corporation of the city of New Orleans shall subscribe for five thousand shares of the capital stock of the Commercial Bank of New Orleans, then, and in that case, the City Council of New Orleans shall annually elect, by ballot, from the Mayor, Recorder and Aldermen of said Council, two persons, who shall be members of the Board of Directors; and the stockholders shall only elect eleven instead of thirteen directors, as provided for in the third and sixth sections of this act, in which election the said City Council shall not vote as stockholders; *provided*, that nothing herein contained shall be so construed as in any manner to impede, diminish or impair the rights and powers granted to the City Council of New Orleans, and to the committee to be appointed by them annually, by virtue of the eleventh section of this act.

SEC. 23. *Be it further enacted, etc*, That the provisions of the thirteenth section of this act, relative to half yearly dividends, shall not be so construed as to apply to the stock subscribed for and owned by the corporation of the city of New Orleans; the dividends arising from the shares so owned shall be applied, first, to the payment of the interest on the bonds given to the Commercial Bank of New Orleans for the stock subscribed by the said corporation, and the surplus shall be passed to the credit of the said corporation, half yearly, at such times as dividends are payable to other stockholders, to be set apart as a sinking fund, applicable alone to the payment of the bonds of said corporation when they shall become due; and the said corporation shall be allowed an interest of five per centum per annum on the same by the Commercial Bank of New Orleans.

SEC. 38. *Be it further enacted, etc.*, That the corporation of New Orleans shall be supplied by the said company, free of charge, with all water necessary for the extinguishment of fires and other public purposes; nor shall the City Council be subjected to any charge for water furnished to supply the gutters of the said city and faubourgs; and that the said company as they progress in laying aqueducts, shall place, free of any charge whatever, two hydrants of a proper construction, in front of each square, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn, for extinguishing fires, for wetting, washing and watering the streets and gutters, and any other public purpose; that on the squares which do not front on the river, the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners: that the said hydrants shall

be of a proper size and made so as at all times to furnish water for the fire engines, and purposes herein mentioned; it shall further be the duty of said company, to supply water for all the purposes herein mentioned, at all times, during the continuance of this charter, unless prevented by some unavoidable accident; and in case such shall occur, the repairs shall be made and the water again furnished at the expiration of the necessary delay; and the said company shall supply a sufficient quantity of clear, pure and wholesome water for the use of the inhabitants, within the limits aforesaid at the elevation of fifteen feet, when the same may be required. *Provided, however*, that said hydrants shall be under the control of the Commercial Bank.

SEC. 41. *Be it further enacted, etc.*, That the second section of this act shall not be so construed as to apply to the payment of ten dollars per share *at the time of subscribing* on the stock subscribed for by the City Council of New Orleans. But said corporation shall, within thirty days from the organization of the first Board of Directors of the Commercial Bank of New Orleans, execute in the form required by the directors, the bonds of the Mayor, Aldermen and inhabitants of New Orleans, to the order of the President and Directors of said company, for the full amount of stock subscribed by the corporation aforesaid, say five hundred thousand dollars, bearing an interest of five per centum per annum, payable in forty years, the interest on said bonds to be paid semi-annually; and should the bonds taken by said company from the corporation aforesaid, be sold at a premium, such premium or excess, over and above their par value, shall form a part of the sinking fund, as provided for in the twenty-third section of this act.

SEC. 42. *Be it further enacted, etc.*, That when, after the expiration of thirty-five years, the said corporation of New Orleans shall be inclined to buy the said waterworks from the Commercial Bank of New Orleans, the price shall be fixed by arbitrators, five of whom shall be chosen by the President and Directors of the Commercial Bank of New Orleans, and five by the City Council of New Orleans; said arbitrators not to be stockholders in said company, nor members of the City Council of New Orleans. Said arbitrators shall take into consideration the *value* of the waterworks and grounds appertaining thereto for supplying the city and faubourgs of New Orleans with water by the said company, and if they agree, and so report *in writing*, their award shall be binding on the respective parties. But in case of disagreement, the Judge of the Judicial District Court in which the said waterworks are situated shall appoint, as umpires, five disinterested individuals as above, whose decision and award, *in writing*, reported to the Judicial District Court aforesaid, shall be binding and conclusive. And the amount so agreed upon shall be payable in the bonds of the Mayor, Aldermen and inhabitants of New Orleans, bearing an interest of five per centum per annum, interest payable thereon semi-annually, and redeemable in

not less than ten, nor more than thirty years from the day on which said award shall be signed, and the said waterworks delivered over to the said corporation of New Orleans.

SEC. 44. *Be it further enacted, etc.*, That the corporation of New Orleans shall and may continue to make use of the waterworks now owned by the said corporation, for supplying the city with water, until the Commercial Bank of New Orleans shall be so far advanced with the works contemplated by this act, as will enable them to furnish water in such parts of the city as are now supplied by the works at present in operation; or until, by the progress of the waterworks so to be constructed, it may become necessary to remove the pipes at present in use, should such removal be found necessary.

SEC. 45. *Be it further enacted, etc.*, That the said company, in constructing the waterworks aforesaid, shall purchase from the Mayor, Aldermen and inhabitants of New Orleans, the pipes already laid down by said corporation, at such price as may be agreed upon by seven arbitrators, of whom the superintendent of the works proposed to be constructed, shall be one, and three to be chosen by the President and Directors of the Commercial Bank of New Orleans, and three by the City Council of New Orleans, whose award, as to the *value* of said pipes, for the use of said company, shall be final.

# Supreme Court of the United States.

No. 284.

THE CITY OF NEW ORLEANS, APPELLANT,

*vs.*

JOHN A. MORRIS, FREEMAN CLARK, CHARLES T. HOWARD, JOHN KLEIN AND JACK WHARTON.

*Appeal from the Circuit Court of the United States for the District of Louisiana.*

SUPPLEMENTAL BRIEF OF COMPLAINANT AND APPELLANT.

We now call the attention of the Court to the following *Additional Point of Law* upon which we also rely for a reversal of the decree appealed from. *Defendants were not enttiled to writs of fieri facias to enforce their judgments against the City of New Orleans*, for by act No. 5 of the extra session of 1870, passed by the General Assembly of the State of Louisiana, it is provided that no writ of execution or *fieri facias* shall issue from any of the Courts in the State of Louisiana against the City of New Orleans to enforce the payment of any judgment for money against said city. Under the provisions of said act another complete and adequate remedy is given to the judgment creditors to enforce and collect their claims, which have been reduced to judgments. See act No. 5,

approved March 17th, 1870, printed in appendix to this supplemental brief. This act was in full force and effect and made part of the laws of the State at the time of the adoption of the Process Act of June 1st, 1872, by the Congress of the United States, whereby the mode of proceeding therein provided was made binding and obligatory upon the Federal Courts, and which Federal Statute is now incorporated into the Revised Statutes of the United States, section 916. In other words, the question we now propound is: Have the judgment creditors of the City of New Orleans the right to enforce payments of their judgments by the ordinary process of execution, or must they resort to another and different mode of realizing the fruits of their judgments against this municipal corporation?

The Supreme Court of Louisiana has, in a number of decisions, upheld the constitutionality and validity of this Statute, and rigorously applied its provisions in favor of the judgment creditors of the city.

City of New Orleans *v.* Ruleff *et als.*, 23 An., 708.

State ex rel. DeMonasterio *v.* Shaw, administrator, 23 An., 790.

State ex rel. Strauss *v.* Brown, administrator, 30 An., 78.

State ex rel. Carondelet Canal and Navigation Co. *v.* Mayor, &c., administrators of New Orleans, 30 An., 129., Idem, 30 An., 705.

And this Court has held that this Statute did not necessarily impair the obligation of any contract.

Louisiana *v.* New Orleans, 102 U. S., 203.

Even if there existed no statutory provision prescribing the mode of executing judgments against the City of New Orleans, upon general principles universally recognized in all the Courts of the United States, both State and Federal, *mandamus*, and not the writ of *fieri facias*, is

the appropriate remedy for enforcing the payment of a judgment against a municipal corporation

Hermann on Executions, § 364.
Gooch *v.* Gregory, 65 N C., 142.
Lutterloh *v.* Board Commissioners Cumberland Co., 65 N. C., 143
Peterkin *v.* City New Orleans, 2 Woods, 100.
Benbow *v.* Iowa City, 7 Wall., 313.
Supervisors *v.* Rogers, 7 Wall., 175.
Amy *v.* Supervisors, 11 Wall., 136.
County of Cass *v.* Johnson, 95 U. S., 360.

ANSWER TO APPELLEE'S BRIEF.

1. In reply to the points made by appellee's counsel in their brief filed in this court, we have to say: That by the Louisiana Code of Practice, (see title *Injunction*,) it is expressly stipulated that the remedy by injunction is the relief afforded a defendant whenever "the Sheriff is proceeding to execute a judgment contrary to some provision of law." (La. Code of Practice, Arts. 296, 298; Act of March 14, 1855, Sec. 3.)

It is the writ universally resorted to in the courts of that State to protect the exempted property of the judgment debtor from seizure and sale under execution.

Police Jury *v.* Michel, 4 An., 84.
Police Jury Parish of Plaquimines *v.* Foulhouze, 30 An., 64.
Prather *v.* Bobo, Sheriff, 15 An., 524.

It has been frequently applied to arrest the seizure and prevent the sale of the *homestead* belonging to the defendant in execution.

Doughty *v.* Sheriff, 27 An., 356.
Hargrove *v.* Flournoy, Sheriff, 26 An., 646.
Robert *v.* Coco, 25 An., 200.
White *v.* Givens, 29 An., 572.
Tison *v.* Taniehill, Sheriff, 28 An., 793.

2. The complaint here made is *not* that the seizure was exorbitant and to have it reduced under the Articles of the Code of Practice cited by appellees, but that *the property seized was exempt from and not subject to execution at all;* hence the authorities relied upon do not apply.

We are asking a Court of Chancery to protect trust property, of which a Municipal Corporation is the trustee, from spoliation. The point as to the jurisdiction of the Court was not made below, and the question was there conceded by the plea filed. A change of Counsel in this Court seems to have caused this sudden change of front.

3. The City of New Orleans is not *a third person*, but the defendant in execution, and hence the Articles of our Code of Practice relative to the *Opposition of Third Persons*, and the decisions thereon are entirely foreign to the case in hand, where the judgment debtor is the *sole* party complaining.

4. The same authority that adopted the Civil Code of Louisiana subsequently enacted the Charter of the Water Works Company into a law in 1877. This latter Statute, even if it conflicts with the former, which we deny, must prevail, because *the* Revised Civil *Code* is a *general* and *the Charter* of the Water Works Company is a *special law*, and because this special Statute was the last enacted.

The word *bankrupt* used in the complainant's bill was employed in its ordinary signification, *id est*, that the property of the city was not equal in amount to the debts and liabilities due by it. Of course we did not mean to say that the property subject to municipal taxation in the City of New Orleans was inadequate to meet her obligations. The contrary is a notorious fact.

A Municipal Corporation cannot become a bankrupt; cannot take advantage of the Insolvent Laws in Louisiana, or go into bankruptcy under the laws of any State with which we are acquainted. As long as the power of tax-

ation exists it may be called into active operation to pay municipal debts.

Respectfully submitted,

E. HOWARD McCALEB,
*for Complainant and Appellant.*

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## APPENDIX.

"An act to limit and restrict the power of courts to issue orders or writs of mandamus and *fieri facias* against the City of New Orleans, and the officers thereof, and to declare the effect and prescribe the mode of satisfying judgments for money against the City of New Orleans.

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That from and after the passage of this act, no court within the State shall have authority or jurisdiction to allow, order, hear, entertain or enforce any summary process or proceeding, or writ or order of mandamus, or any order or proceeding in the nature of an order or writ of mandamus, either against the controller, deputy controller, or any auditing officer of the City of New Orleans, the object of which shall be, either directly or indirectly, to obtain or compel said controller or deputy controller, or auditing officer, to issue and deliver any order or warrant for payment of money, or against the treasurer, assistant treasurer, or any officer or officers charged with the disbursement of the moneys of the City of New Orleans, the object of which shall be, either directly or indirectly, to enforce the payment of money claimed to be due from the City of New Orleans to any person, persons, corporation or corporations whatsoever, but all actions or proceedings for the recovery of any sum of money claimed to be owing from the City of New Orleans shall be in the ordinary form of action, instituted against the City of New Orleans as a corporation, as against a corporation and not against any branch, department or officer thereof, and shall in all respects be conducted in the same manner as other ordinary actions.

"SEC. 2. *Be it further enacted, etc.*, That hereafter no writ of execution or *fieri facias* shall issue from any of the courts in this State against the City of New Orleans to enforce the payment of any judgment for money against the City of New Orleans, but final judgment against the City of New Orleans, condemning said corporation to pay any sum in money, when the same shall have become executory, shall have the effect in law of establishing and fixing the amount of the plaintiff's demand against said corporation, and the plaintiff may cause a certified copy of the said judgment, together with a copy of the plaintiff's petition and the defendant's answer, in the cause in which such judgment is rendered, together with the certificate of the clerk of said court that such judgment is final and executory, to be filed in the office of the controller of said city, and it shall be the duty of the controller or auditing officer of said corporation to receive the same, and cause the same to be registered in his office on the date on which the same shall have been presented; and when so registered, it shall be the duty of the controller to warrant on the treasurer or disbursing officer of the corporation, for the amount due thereon, without any special appropriation of money therefor by the common council; *provided, always*, that there be sufficient money in the treasury to pay such judgment, specially designated and set apart for that purpose in the annual budget or detailed statement of items of liability and expenditure required to be made by the one hundred and twenty-fourth section of the act of the legislature, entitled an act to amend an act entitled: 'An act to consolidate the City of New Orleans and to provide for the government of the City of New Orleans, and the administration of the affairs thereof,' approved March twentieth, eighteen hundred and fifty-six, or such laws as may be hereafter enacted relating thereto.

"SEC. 3. *Be it further enacted, etc.*, That in case the amount of money designated in the annual budget for the payment of judgments against the City of New Orleans, at the date when any judgment against said corporation shall have been final and executory shall have been exhausted, the common council will have power, if they deem it proper, to appropriate from the money set apart in the budget or annual estimate for contingent expenses,

a sufficient sum of money to pay said judgment or judgments; but if no such appropriation be made by the common council, then all judgments shall be paid in the order in which they shall be filed and registered in the office of the controller, from the first money next annually set apart for that purpose.

"SEC. 4. *Be it further enacted, etc.*, That if by failure of the controller or auditing officer of the City of New Orleans, or of the treasurer or disbursing officer of said corporation to perform this duty, or if, by reason of the neglect or malfeasance of them, or either of them, any person, persons, corporation or corporations shall be unjustly delayed in the payment of any judgment or demand against the City of New Orleans, or shall not be paid in their due and regular order in which demands are entitled to be paid, and shall be prejudiced and suffer loss and damage thereby, or by reason of any unjust preference to other creditors, such person, persons, corporation or corporations, so injured by the act of either of said officers, shall have a right of action against such officer or officers individually, by whose act or acts he or they have suffered loss and damage, and against the surety or sureties on the official bond of such officer, and may recover damages therefor against said officer and sureties for such amount as they may establish on the trial of such cause.

"SEC. 5. *Be it further enacted, etc.*, That this act be in force and take effect from and after its passage, and that all acts and parts of acts in conflict with this act be and are hereby repealed, in so far as the same may conflict with any of the provisions of this act."

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# Supreme Court of the United States.

No. 284.

THE CITY OF NEW ORLEANS

*vs.*

JOHN A. MORRIS ET AL.

*From the Circuit Court of the United States in Louisiana.*

JOHN A. CAMPBELL,
W. W. HOWE,
*for Appellees.*

*Clark & Hofeline, Brief Printers, 112 Gravier Street.*

# Supreme Court of the United States.

No. 284.

THE CITY OF NEW ORLEANS

*vs.*

JOHN A. MORRIS ET AL.

*From the Circuit Court of the United States in Louisiana.*

STATEMENT OF FACTS.

The appellees are all judgment creditors of the appellant, holding bonds of the city of New Orleans, issued under the authority of the State in 1854 and subsequently: also upon bonds assumed in 1874. These judgments were all rendered in the Circuit Court of the United States in 1875, 1876, 1877, 1878, and executions were duly issued and returned thereon without satisfaction. In December, 1878, these executions were re-issued, and in January, 1879, were duly levied upon 4344 shares of stock by the marshal which were by the marshal advertised for sale according to the tenor of the writs against the appellant, in his hands.

The appellant filed a bill in the Circuit Court for an injunction to stay the sale, to which the appellees and

the marshal are defendants. The defendants appeared and filed their pleas to the same.

## II.

### THE PLEADINGS, TESTIMONY AND DECREE IN THE SUIT.

The plaintiff claimed in the bill that these shares of stock under seizure were not subject to seizure, for that in the year 1833 a banking company was incorporated with a privilege to supply the inhabitants with water from the Mississippi river by means of machinery and pipes.

It was provided that the city might purchase these at the end of thirty-five years, with her own bonds, after an appraisement. This purchase was completed in January 1869, and the plaintiff issued bonds for the price. The city of New Orleans, under the authority of her charter, managed these waterworks from the time of their purchase until 1878, and until the city had failed in the payment of the bonds in the hands of the appellees and until after judgments and executions had been obtained by them and until after they had become ineffective to compel satisfaction. In the year 1877 an act of the General Assembly of Louisiana was passed, being No. 33 of the acts of the extra session of that year.

The object of this act was to authorize a sale of the waterworks to a corporation incorporated by that act. By the terms of the act the price of this property is ascertained and the company authorized to buy it and to pay to the city of New Orleans shares of stock in that company as a part of the price. The shares of stock

seized by the marshal under the executions of the appellees are included as a part of this price. The stock was issued by the company to the city.

The complaint of the appellant is that the shares of stock are protected from seizure by two sections of the act No. 33.

The seventh section is: "THAT THE STOCK OWNED BY SAID CITY OF NEW ORLEANS IN SAID WATERWORKS COMPANY shall not *be liable to seizure for the debts of said city.*"

The fourteenth section is: "That the city of New Orleans, through its Council, shall have authority to apply the stock subscribed for by said city to the reduction of the bonded or floating debt of the said city on such terms of adjustment as may be agreed upon between the City Council and the holders of such bonded or floating debt; Provided, said stock shall not be sold at less than par; and that when sold for obligations of the city, it shall only be done under sealed proposals. after not less than fifteen days' advertisement in two daily newspapers, to the bidder who shall offer said obligations at the most advantageous rate, the Council reserving the right of rejecting any and all bids." P. 13, § 14.

The complaint in the bill is, that these creditors are illegally seeking to deprive the city of this fiduciary capacity, and preventing her from applying the stock to the reduction of those debts, and that they seek a wrongful advantage. The city claims it will suffer damage that cannot be repaired.

The prayer of the bill is to be found at p. 4, fo. 9. It is, that the defendants be enjoined from further proceed-

ings with the seizures, advertisement and sale of the stock; that the executions be *quashed, annulled and set aside*, and the property be declared to be exempt from sale, and for injunction and general relief. The stock held by the city was granted by the second section of the act, p. 8, fo. 19, and *seems* to have been derived from the ownership and subscription which the city had made to the stock of the Commercial Bank incorporated in 1833 to build these works. The fact is not distinctly stated in the act of 1877.

The record contains an ordinance of the City Council for the sale of this stock according to the power dated 19th April, 1878, pp. 41, 42. There is evidence that the stock was worth about 30 or 31 cents on the dollar, and had ranged from 30 to 35 cents on the dollar. Record, 41, 42. 50. No sale was made by the city, The defendants filed a plea to the bill of the plaintiff in the Circuit Court. pp. 44, 45.

The import of the plea is, that the debts in respect to which the judgments were rendered in the Circuit Court were prior in point of time to all of the enactments which sequestered the shares of stock from judicial process: that executions had been previously issued without result; and that no property exists in the possession of the city from which the judgments can be satisfied; that the General Assembly was not authorized under the constitution of the State or of the United States to impair the obligations of the contract, and that the stock is liable to the executions.

The case seems to have been determined upon the plea

and the motion for injunction. Record p. 48, fo. 110. The decree is to direct the dismissal of the bill with costs.

The city of New Orleans claimed relief, as we have seen, upon two distinct provisions of the charter of the Waterworks Company. One of these is contained in the seventh section of the corporation which prohibits the seizure of the shares of stock for the debts of the city. The second is. that set forth in the 14th section of the same act, which provides a sale by the corporation for the payment of debts of the city in the manner set out in that section, and an ordinance of the City Council already cited. Record, p. 13, § 14. Rec. 41, 42.

## III.

### POINTS AND AUTHORITIES.

The first inquiry suggested by the record before us is, that which concerns the jurisdiction of a Court of Chancery with any question presented by the facts as disclosed therein. The suits in which judgments were rendered for the appellees, were common law actions, in debt. The executions directed the collection of the debts from the property of the city of New Orleans, the defendant, in all of the suits. The marshal seized shares of stock

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X See affidavits and Statement filed April 10 1882

(must) take cognizance of the manner of their execution when the proper manner of their execution is to be determined.

C. P. 617, 629 ; Compton vs Airial, 9 A. 496.

If the seizure which shall be made by the marshal or sheriff, be exorbitant, or if property be seized which the law has exempted from the operation of the writ, an application may be made to the Court for an abatement of the excess or for a discharge of the levy upon the application of the defendant in the execution.

Code of Practice, Arts. 651, 652.

Dabbs vs. Hawkin, 3 R. 123.

Temple vs. Marshall, 11 A. 613.

The court, whose process has been abused, has plenary authority to control its officer, and to correct his inordinacy upon the application of the defendant. It is not a function of a Court of Chancery to "quash," to annul, or to "set aside," writs of execution issuing from a court of law, nor to instruct courts of law nor the officers of courts of law, what property is subject to execution, nor to supervise nor restrain seizures, advertisements or sales made under judicial process from courts of law. All questions as to immunity from judicial process, are questions arising out of positive law, and are of cognizance by courts of law.

2 Tidd's Pr. 1032.

Amis vs. Myers, 16 H. 492.

Farrell vs Mickee 36 Ills 225

II.

The remaining claim of the city of New Orleans, for the interposition of Chancery is equally untenable.

This claim is preferred under the 7th and 14th Sections of the charter of the Waterworks Company.

The statement of the bill is that the city, through its Council, under the terms of that section had authority to apply these shares of stock "on such terms of adjustment as the City Council and the creditors of the city might agree, and that the city holds said stock in trust for the benefit of such holders of such bonded and floating debt, and that in compliance therewith, the city is using the stock for that purpose, and that defendants to the bill have no right to arrest, hinder, prevent or delay her in the execution of said trust, or to divert the trust fund by illegal seizures, etc. Record, 3, 4, fo. 9.

We might concede these averments to be of force, and yet the jurisdiction of a Court of Chancery would not be established, nor the authority of the court of law in any manner diminished by the statement. The Code of Practice contains exact provisions for any case of misuse or abuse of process affecting the defendant or any person not a party to the suit. This is done by opposition filed in the court and the cause, and when this is done by one not a party to the record, it is denominated a third opposition. The articles of the Code of Practice, Sec. V. ch. III, 395, 396, 397, 398, 399, describe the method of procedure. C. P. 300-400.

Van Norden vs. Martin, 99 U. S. R. 378.

Ames vs. Meyer, 16 H. 492.

Mobile, etc. vs. Moore, 9 Porter, 679.

Cairns vs. Smith, 8 John, 337.

## III.

### THE VALIDITY OF THE CLAIM OF APPELLANT.

### I.

The debts represented by the judgments of the appellees described in the records filed in this suit were created in part above twenty years before the filing of the bill, or the adoption of the charter of the Waterworks Company; all, were created a number of years prior thereto.

When the arrangements embodied in this charter were authorized, the bill tells us that the appellant was in a *bankrupt* condition, and unable to pay interest on the debt due, and was harrassed by creditors. The judgments of the appellants at that date had been due for one and two years. This legislation of the State was framed to shelter the city from the legal pursuit of her creditors. The Act No. 5, of 1870, and the Act No. 31, of 1876, prohibited the issue of writs of mandamus to compel the city to pay any debt not liquidated by judgment, or to compel the levy of any tax except an amount to launch the scheme of the premium bonds.

In immediate relation to the policy disclosed by that legislation, the act relative to the Waterworks, was enacted. The covering of property from judicial process otherwise liable is a prominent feature in the design of the act; and this seems to be the matter most relied on in the bill.

The act incorporating the Waterworks Company, declares an immunity of the stock owned by the city from seizure, and another section of the act we have quoted authorizes the city to sell the stock at not less than three

times more than its market value, upon sealed proposals, which the city might accept or reject at its pleasure.

Under the Constitution of Louisiana, and according to its Code, "no ex post facto nor retroactive law, nor any law impairing the obligation of contracts shall be passed; nor vested rights be divested."

Cons. 1868, Sect. 110.

The Revised Code contains a provision which is coeval with the State. "A law can prescribe only for the future; it can have no retrospective operation; nor can it impair the obligation of contracts." Rev. Code, p. 46, Art. 8.

The Supreme Court of Louisiana, nearly a half a century ago, affirmed that "The Constitution of the U. S. prohibits any State from passing laws which will impair the obligation of a contract. As the obligation here spoken of, is the legal and not the moral obligation, it would seem to follow that the obligation of a contract is that which the law in force at the time the contract was made, obliges the party to do or not to do."

If this be true, the right of each is to obtain performance of any obligation arising out of the agreement at the period it was entered into. The remedy is the means given by law to carry it into effect.

VI Mart. N. S. 585. Sabatier Creditors.

The organic law of Louisiana, her Civil Code and Code of Practice, alike, condemn the statute we are considering. The Constitution of the United States has been incorporated as a part of the State law, by the State and its people.

A long list of cases condemn the allowance of excep-

tions of property for execution, unless limited to contracts to be made after the passage of the act.

Bronson vs. Kinzie, 1 H. 311; McCracken vs. Haywood, 2 H. 608.

Homestead Cases, 22 Grattan, 266.

Bridges vs. Walcott, 7 Minn. 511.

Gunn vs. Barry, 15 Wall. 610.

The jurisdictional prohibitions contained in the various acts which have been passed by the Legislature to place the city of New Orleans beyond the reach of compulsory process in the matter of the collection of debts contracted by her corporate authorities can form no impediment nor obstruction in the enforcement of judgments like those described in this record.

Gunn vs. Barry, 15 Wall. 610.

Wolff vs. New Orleans, 103. U. S. 358.

Moore vs. New Orleans, 32 Ann. 726.

Saloy vs. New Orleans, 33 Ann. 94.

II.

The 14th section of the charter of the Waterworks Company does not afford any substantial support to the claim of the appellant. It is a complement to the seventh section, and elucidates it. That section shielded the stock from seizure under execution. The 14th section confides to city authorities a power to sell the stock at not less than the par value; and only after advertisement for sealed proposals, and with a discretion to reject the bids.

The Revised Code of the State had provided before

these bonds were issued, and which still provides that the property of a debtor shall be liable for all the consequences attending his failure to perform his contractual obligations. Rev. Code, 1968, 3183. From these principles the Code declares that every act done by a debtor to deprive his creditor of this right is illegal and ought, as respects such creditor, to be avoided. The constitution, we have cited, only confirm these provisions. Rev. Code, 1969; Const. § 110; Rev. Code, p. 23. The Code of Practice had provided for writs of fieri facias. The sheriff might seize the property *real and personal, rights* and credits of the debtor and to sell them to satisfy the judgment. This Code contained the exemptions from the operation of the writ, allowed in favor of families and natural persons. Rev. Code Practice, pp. 162, 3, 4.

Arts. 641 to 648. Movable property was to be sold without appraisement, and after advertisement. By means of the seizure the execution creditor obtained a privilege. C. P. 722. Suppose this debtor had made an assignment of these shares of stock to a trustee or mandatary, to sell them at auction at his discretion, after advertisement, to the highest bidder, for the bonds and evidences of debt of the debtor, and to transfer them to this highest bidder. It is obvious that such a transfer would be fraudulent as to creditors. The intent of such an assignment would be not to provide equally for the creditors, but to give a preference to that creditor who would submit to the largest sacrifice. The pressure imposed comes from the debtor and for his advantage to the prejudice of other creditors.

It is admitted in the bill that the plaintiff was in a bankrupt condition. This bankrupt is charged with the control and custody of the property, and with the selection of the time for inviting *sealed proposals* for the sale of her property. The debtor is not required to accept any bid, but may reject any, and finally may accept the bid of a favored creditor, and is not required to make any distribution.

The Codes of Louisiana conferred upon creditors the right to determine whether indulgence was due to the debtor and gave specific and defined remedies to enforce their right to payment. The same codes allowed a cession of property for the benefit of creditors alike.

This act of the Legislature allows the debtor to retain the property without consultation with the creditors. It allows the debtor to sell the property at discretion, and without oversight. It does not provide for a sale publicly, but after sealed proposals, and does not require the payment of money but evidences of debt, which the debtor is to verify and validate. The act was designed to compel creditors to relinquish a large share of their claims and to coerce them to bid against each other for the property bound to them.

Grover vs. Wakeman, 11 Wend. 187.
Gazzou vs. Poyntz, 4 Ala. 374.
Boardman vs. Halliday, 10 Paige, 223.
Bump, Fraud. Con. 373, 380.

III.

The contrary argument is that the clause of the Constitutions of the United States and Louisiana, we have

cited, and the articles of the Civil Code and of the Code of Practice declaring the force of conventional obligations and the remedies that are granted to the creditor have no force. The history of the Waterworks as connected with the Commercial Bank, is of no importance to this suit. In January, 1869, the Waterworks became the property of the city of New Orleans, and in 1878, this property was sold to the Waterworks Company, and the shares of stock embraced in this controversy became the property of the city. There had been an article of the Civil Code in force for fifty years, to the effect that "whoever has bound himself personally, is obliged to fulfill his engagement out of all his property, movable or immovable, present and future. C. C. 3182. For the same period the Code of Practice had established modes of procedure to accomplish the command of the Code.

The shares of stock are comprised in the description of the subjects which these codes have set apart for the fulfillment of the obligations they are designed to maintain. The contracts of the city have been established by the judgments of the courts, and when these shares of stock came to the ownership of the city, she held them as property applicable to the payment of bonds and obligations.

The appellant affirms that this property is public, out of commerce designed for a public use, common to all, and not to be appropriated to any other than public uses. But there is no foundation for this conclusion or assumption. Under the definitions of the code these shares of stock are movable property, with respect to every associate in the corporation. C. C. 474.

The city of New Orleans, by its Charters of 1852 and 1870, was invested with full powers of acquiring property and of contracting obligations, and with all the faculties, rights, privileges incident to a municipal corporation.

It could sue and be sued.

It is admitted that the property administered by the city of New Orleans under the authority of the State as a public trust cannot be seized by sheriff or marshal.

Dillon on M. Corp. §§ 64, 65. 446; 1 La. An. 435.

But no such immunity appears to property held by this corporation under the same conditions as those shares of stock. This has been decided by the Supreme Court of Louisiana.

New Orleans vs. Home Insurance Co., 23 An. 61.

2 Dillon on Municipal Corporations, § 446.

Municipality No. 3 vs. Hart, 6 An. 570.

The individual property of a municipal corporation, under the Codes, was as much liable as those of an individual. In 1870 there was a partial prohibition of suits against the city of New Orleans for the payment of judgments. In 1876 the city was exempted from all responsibility from judgments and suits except as to the premium bonds. The act of 1878 was to confer a protection to the property in its possession, and thus to put creditors at bay.

All of these measures are prohibited by the constitution and codes of the State and of the Union.

JOHN A. CAMPBELL,
W. W. HOWE,
*for Appellees.*

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# Supreme Court of the United States.

CITY OF NEW ORLEANS
*vs.*
JOHN A. MORRIS ET AL.

No. 284.

**On Behalf of Defendants.**

I. The undersigned, as *amicus curiæ*, begs leave to say that this case involves public interests of the city of New Orleans, and that its importance cannot be overestimated when it is considered that there are at stake, in this suit, 4,344 shares of the New Orleans Water Works Company now in circulation in the public.

A reversal of the judgment rendered by the court *a quâ* would open the floodgates of litigation, involving a number of persons who do not suspect the impending danger.

II. The city of New Orleans, plaintiff in error, claims to be the unaffected owner of these shares of stock, notwithstanding their seizure by the United States marshal.

Defendants in error are the judgment creditors of the city of New Orleans. They have levied upon these shares of stock. Hence the injunction suit, now on appeal, in which plaintiff in error claims exemption from seizure.

III. Before considering the pleadings, it is useful to ascer-

tain the origin and character of the several claims, merged into the judgments, sought to be enjoined.

*First.* Freeman Clark *vs.* Jefferson City Gas-Light Co. *et al.*, No. 7142 of the United States Circuit Court.

Petition filed 7th February, 1874, and judgment rendered May 7, 1875. (See R., pp. 22–30.) The date of the contract on which this suit was brought was 1*st July*, 1871.

*Secondly.* John A. Morris *vs.* City of New Orleans, No. 7362. Suit filed 18th February, 1875; judgment signed May 26, 1875. Suit on bonds of city of New Orleans issued *May* 1, 1854, *and January* 1, 1855. (See Rec., pp. 30–33.)

*Thirdly.* John Klein *vs.* City of New Orleans, No. 7801 of U. S. Circuit Court.

Suit filed March 16, 1876; judgment signed May 6, 1876.

Suit on bonds of city of New Orleans issued *March* 15, 1854. (R., pp. 33–35.)

*Fourthly.* Freeman Clark *vs.* Jefferson City Gas-Light Co. and City of New Orleans, No. 8349 of U. S. Circuit Court.

Suit filed 14 January, 1879; judgment signed March 30, 1879. Suit brought on bonds issued in payment for pipes laid to furnish light to the city on 11th January, 1871. (Rec., pp. 35–40.)

*Fifthly.* Myra C. Gaines *vs.* City of New Orleans, No. 2695 of U. S. Circuit Court.

The record of this suit, although offered in evidence by appellant, is not in the transcript of appeal. The only part copied in the transcript is a motion for an order of execution. (Rec. p. 40.)

No data is furnished to the court of the nature, origin, or date of the claim, merged in the judgment No. 2695. And yet appellant expects to reverse the decree of the

court *a quâ* and obtain writs of injunction staying its execution.

As regards the four other judgments, against the execution of which writs of injunction are sought, they are based upon *contracts with appellant, bearing dates respectively during the years* 1854, 1855, *and* 1871.

IV. The ground of complaint is that these judgment creditors have levied upon "all the right, title, and interest of the city of New Orleans, in the N. O. Water Works Company, consisting of 4,344 shares of its capital stock, more or less."

So the bill of complaint recites, and correctly, too. The marshal did levy upon 4,344 shares of the stock of this company outstanding in the name of the city of New Orleans.

Throughout appellant's elaborate brief these shares of capital stock in a company are confounded with the waterworks themselves, used for the purpose of furnishing and distributing water throughout the limits of the city of New Orleans.

The seizing creditors have not levied upon these waterworks, nor does the bill prefer any such complaint, unless inferentially in the charge that in the legislative charter of the New Orleans Water Works Co. of March 31, of 1877, sec. 7: "That the said rights were, *by their nature and character*, not liable to such seizure for the reason that the interest of your oratrix in said company is public property, used for public and necessary purposes, and essential to the proper exercise of the public powers of your oratrix."

This confusion of ideas as to the shares of stock of the company belonging to the city, and the use of the water works as part of the governmental functions of the municipality, forms the basis of the argument in appellant's brief. Hence the fallacy of all the conclusions.

Yet the bill of complaint should have put appellant upon

her guard in this respect, since it is there expressly alleged that these very shares of stock are to be used exclusively for "*the reduction of the bonded and floating debt of said city;*" and "*that she has been and still is applying the stock subscribed for and owned by her in said company to the reduction of said bonded and floating debt.*"

So that in one breath we have property, out of commerce, "*used for public and necessary purposes, and essential to the proper exercise of the public powers,*" and the same property, legally destined for commerce, to be used in payment of the debt of the city.

The bill, however, goes further. Abandoning the idea of property essential to the proper exercise of the public powers, it charges that the city is a mere trustee of this very property for the benefit of her creditors owning the bonded and floating debt of the city, and that these shares of stock constitute a trust fund for the benefit of private individuals! And it is for these private individuals, and to prevent "*great wrong and injury*" *to these* "*cestui que trusts,*" that application is made for the equitable writ of injunction.

The burden, however, of the bill of complaint is that these 4,344 shares of the city of New Orleans in the New Orleans Water Works Company are public property, the use of which is "essential to the proper exercise of the public powers" of the municipality; that by their nature and character they are not liable to seizure; that, besides, they are expressly exempted from seizure by legislative provision in the charter of the Water Works Company; and that, however, they constitute a trust fund for the payment of bonds and floating debts of the city, to be disposed of by the city herself in the manner and for the purposes mentioned in that legislative enactment.

V. The legislative charter of the Water Works Company, made a part of the bill, has specific stipulations as to the shares of stock held by the city of New Orleans.

The other stockholders vote on their stock for four directors, the city having no voice in such elections. On the other hand, the quantum of shares of stock, which she may have, does not enter into account for the representation which she is allowed in the board of directors; but, are *ex officio* members of this board, the mayor of New Orleans and her administrators of finance and of water-works. (Sec. 6; see also act of Louisiana legislature No. 43, amending the charter of the New Orleans Water Works Company. R. p. 14.)

The transfer by the city of her shares of stock does not affect her representation on the board of directors; for although the bulk of her shares of stock is thus constantly dwindling down by the gradual reduction of her bonded and floating debt, still, under the imperative terms of the statute, her mayor and two administrators remain *ex officio* members of the board of directors.

With regard to the claim that the shares constitute a trust-fund, belonging to certain creditors, and cannot be diverted, the charter provides that the exchange of these city shares is to be made by consent with the creditors during one year; but that, *afterwards*, "*the said city of New Orleans shall not thereafter be required to make said exchange, but may retain the unused shares of stock for its own account and benefit, unless it shall prefer to continue to take up any of said outstanding bonds by exchange as aforesaid.*" (Sec. 2.)

The time of one year elapsed, it is left to the option of the city of New Orleans to continue, or not, to use her shares of stock for the reduction of her debt under the terms and conditions of the legislative charter of the company. But, even before the expiration of the year, there was no trust fund created and set apart exclusively for the bonded and floating debt of the city. The city was simply directed

to use this property—the shares of stock—"for the benefit of all holders of water-work bonds now (then) outstanding who may elect to avail themselves of the provisions of this act." This election was to be exercised within twelve months, and there is no complaint that such, as have so elected, are being denied the benefit of this statute.

The bill is now dealing exclusively with bondholders, who have absolutely failed and refused to avail themselves of this act within one year from the formation of the company. These are the *cestui que trusts* adverted to in the bill of complaint.

The bill charges specifically "*the bankrupt condition*" *of the city of New Orleans in the year* 1877—"*her citizens impoverished, her taxable property enormously decreased in value, harassed by her creditors, and unable to pay the interest on the bonds issued by your oratrix in payment of the purchase price of said water-works, and unable to extend said water-works, as the exigencies of the city require.*"

But the brief puts a silver lining to this dark cloud, and finds the "ample powers of taxation and little or no property liable to seizure" an adequate protection for the seizing creditors. It asserts that: "*As a matter of law, these defendants had ample and complete remedy by mandamus to compel the levy and collection of taxes to pay their judgments. The taxing power of the city for that purpose is ample, and even unlimited.*"

Hence the obligations of the anterior contracts of the city of New Orleans are not impaired by the restriction of remedy to the marvellous effects of unlimited power of taxation, and by the subsequent exemption of property from the right of seizure. It does not occur to complainant, in her bill, that this "unlimited right of taxation" existed before the creation of the Water Works Company, as so did the right to seize any property, not used for public purposes and not essential to the proper exercise of municipal powers.

VI. The bill of complaint is met by plea, (p. 44)—

*First.* That the judgments of the seizing creditors "*were all rendered upon obligations of said city antecedent in date to the passage of act No. 33 of the State of Louisiana*," under which the bill claims the right of exemption.

*Secondly.* That "under the laws of the State of Louisiana, which were in force when the respective debts for which they have recovered judgment were incurred, and under the laws of the said State now in force," the said shares of stock held by the city were and are liable to seizure at the instance of all creditors whose contracts antedate the statutory exemption now claimed.

*Thirdly.* "That the operation and effect of the said provisions of said act No. 33, if allowed to have the effect claimed," will very seriously impair the obligation of their respective contracts, and materially obstruct, if it does not entirely prevent, their enforcement by execution.

*Fourthly.* That the property in question is of very large value, its real market value being over $300,000, and that defendants do not know of any other property of the city, liable to seizure, of value sufficient to satisfy to any material extent their respective judgments.

Such are substantially the pleadings upon which this cause was tried and decided. (R., p. 48.)

"*And, thereupon, the counsel for the city of New Orleans and for the defendants, being present, the cause was submitted to the court for decision.*"

The judgment reads:

"*This cause came on to be heard at this term, and was argued by counsel, and, thereupon, in consideration thereof, it was ordered, adjudged, and decreed as follows, viz: That the pleas of the defendants to the bill of complaint be maintained; that the injunction applied for be denied, and the bill be dismissed; and that complainant pay costs of suit to be taxed.*"

The very next day, April 16, 1879, (Rec., p. 48,) without suggesting error by a motion for rehearing, complainant applied for an appeal with *supersedeas*, but obtained only a devolutive appeal.

ARGUMENT.

VII. The question which comes up under the pleadings is, whether the judgment creditors, whose contracts antedated the passage of the legislative charter of the N. O. Water Works Co., have the right to levy upon the city's shares of stock in that company, notwithstanding the exemption of seizure conferred upon these shares.

VIII. "Water-works may," as plaintiff contends, "be considered one of the legitimate and necessary instrumentalitie of municipal government;" and we do not question "the power of a government to establish private corporations to enable it properly to exercise its various functions. It may even entrust to such a corporation a portion of its police power." (Brief, p. 15.)

Conceding these propositions, how would that affect the present case, where there is no attempt to interfere with the police powers of the city of New Orleans, in the matter of the use and management of the water-works themselves,—no attempt whatever to interfere with the functions and the privileges of the N. O. Water Works Company, to whom the statute entrusted a portion of the police powers of the municipality?

Whether the city voluntarily alienates and parts with her 4,344 shares of stock for the reduction of her bonded and floating debt, or whether she allows their seizure and sale to satisfy her creditors, the result is precisely the same. The Water Works Company will proceed, unmolested, in the discharge of the quasi-public functions under all the stipulations of its charter. The city, with her three directors—

the mayor and two public administrators—will continue to exercise her legitimate influence over the company, and see that the police powers entrusted to it shall not be misapplied or perverted.

In one word, the water-works, considered as "a legitimate and necessary instrumentality of municipal government," will continue to operate without the slightest hindrance, resulting from the fact that the city shares of stock, intended for commerce, be treated as property in commerce.

The fallacy of plaintiff's argument is to confound two things of distinct order and classification, as already indicated in the observations made on the pleadings. The true proposition of fact, upon which the argument must turn, therefore, is that the 4,344 shares of city stock are property in commerce under the express terms of the statute, property to be used for the reduction of her debt.

This disposes of the implicit prohibition against the forced alienation of shares of stock, the voluntary alienation of which is expressly authorized and provided for.

IX. The express prohibition is under sec. 7, of the charter: "That the stock owned by the said city of New Orleans, in said Water Works Company, shall not be liable to seizure for the debts of said city."

The answer to this is that defendants' contract antedate the passage of the exemption clause, and that no subsequent legislative exemption can be allowed to impair the obligation of a contract. (U. S. Const'n, sec. 10, Art. I; La. Cons'n, 1868, sec. 110.) The withdrawal of a remedy is the familiar mode of impairing the obligation of a contract; and, as said by the court in Gunn *vs.* Barry, (15 Wallace, 622:) "If the remedy is a part of the obligation of the contract a clearer case of impairment can hardly occur than is presented in the record before us. The effect of the act in question, under the circumstances of this judgment, does not, indeed,

merely impair—it annihilates the remedy. There is none left."

The court further observes: "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, provided the change involve no impairment of a substantial right."

At the time when defendants' contracts were made they had two distinct remedies in Louisiana; the *first*, that of seizure of any property belonging to the city, except such as loses its character as private and assumes the character of public by reason of its being used for governmental purposes; and the *second*, that of mandamus to enforce the exercise of the taxing power to pay a judgment.

A statute of the State of Louisiana abolished the writ of *fi. fa.* or execution against the city of New Orleans; and it is gravely argued by plaintiff (Brief, p. 24) that "the remedy by mandamus, which the law has left him, (deft.,) is ample to obtain payment of his judgment, and, therefore, the withdrawal of the remedy by direct seizure of property of a private character does not in the least impair the obligation of the contracts." And this assertion is made in the face of the Louisiana statute, which had previously abolished the remedy by the collection of taxes through judicial action, in the following words:

"SEC. 1. *That sections* 2628, 2629, 2639, 2747, 2748, *and* 2749 *of the Revised Statutes of* 1870, *and all that portion of article* 625 *of the Code of Practice commencing at and following the word 'provided,' in the sixth line of said section, be and the same are hereby repealed.*"—*Approved April* 10, 1877. (P. 87.)

These sections of the Revised Statutes, and this article of the Code of Practice, contained all the Louisiana legislation for the assessment and levy of taxes to satisfy judgments.

All remedies denied to defendants by the State legislation, which is invoked as leaving an effective and reasonable mode of enforcing the right, and yet the obligation of the contract not impaired! Bear still in mind that the repealed remedy to enforce assessment and collection of taxes in satisfaction of judgments against the city of New Orleans, is levelled at a city, which the bill of complaint graphically depicts as hopelessly insolvent!

Furthermore, the very exemption from seizure of city property in the legislative charter of the N. O. Water Works Company was expressly intended as an impairment of the obligation of the contracts of the city, as will more readily appear by comparing this section 7 with sections 2 and 14 of the charter, and the repeal of laws enforcing judgments against municipalities and parishes through judicial assessment and collection of taxes. Indeed, such is the declared policy of the State legislation; there is no hypocritical disguise of real intention in this respect, and more especially is this the case with reference to the city of New Orleans.

Even these city shares of stock in the Water Works Company are so treated as to leave their disposal absolutely at the option, or even caprice, of the municipality. Section 14, after providing how these shares of stock may be sold in order to effect the reduction of the bonded and floating debt of the city, declares that "*Said stock shall not be sold at less than par, and that, when sold for obligations of the city, it shall be only under sealed proposals, after not less than fifteen days' advertisement in two daily newspapers, to the bidders who shall offer said obligations at the most advantageous rate, the counsel reserving the right to reject any and all bids.*"

This stock is of the par value of about 31%; but it cannot be applied to the payment of bonds and floating debts of the city for less than its face value of $100. And even then

the creditor, who is thus compelled to give his city bonds for stock, really worth but 31% of his debt, cannot even compel the exchange, "*the council reserving the right to reject any and all bids.*"

In other words, the imperative policy of the law is that the city of New Orleans shall regulate the payment of her debts precisely as she deems proper, without outside interference.

And yet she, in her argument in this case, contends that these, her shares of stock, are a trust fund vested in the *cestui que trusts* indicated in her brief.

In the first place, no creditor, whether holding bonded or floating debts of the city, has any vested interest in this so-called trust fund, since the council has the reserved "*right to reject all and any bids.*" These *cestui que trusts* are, therefore, intangible parties. Or, to speak more properly, these creditors have not even an inchoate right in that fund, since the stock is to be disposed of "*on such terms of adjustment as may be agreed upon between the city council and the holders of such bonded or floating debt,*" (sec. 14,) and she may never agree. And besides, under sec. 2, "*it may retain the unused shares of stock for its own account and benefit, unless it shall prefer to continue to take up any of said outstanding bonds by exchange as aforesaid.*"

X. To resume: Defendants, at the date of their contracts respectively, had a two-fold remedy—one by mandamus to compel the payment of their judgment by means of an assessment and collection of taxes, provoked through mandamus proceeding; and they could levy upon any property of a private character belonging, and to belong to their debtor.

Now both remedies are abolished by the State legislation, and it necessarily results that the obligations of their contracts are impaired.

XI. At the threshold of this litigation the inquiry might have been made how it was that this case was prosecuted on the equity side of the court, as there is no remedy asked in the bill of complaint, for which there is not full and adequate remedy at law.

Respectfully submitted.

ALBERT VOORHIES,
*Att'y.*

# In Supreme Court of the United States.

OCTOBER TERM, 1881.

THE CITY OF NEW ORLEANS
*vs.*
JOHN A. MORRIS ET ALS. } *No. 284.*

## Supplemental Brief for Defendants

I.

The stipulation signed by H. B. Kelly, Esq., and by counsel for complainant does not bear the meaning ascribed to it by complainant's counsel at pages 13 and 27 of their original brief. On the contrary, it means that the cause was submitted on the pleas with the admission on all sides that the facts set up in the pleas were true. That there may be no doubt of this, however, as soon as we heard of this stipulation we procured and have filed the following affidavits and statements:

CITY OF NEW ORLEANS, *Appellant*,
*vs.*
JOHN A. MORRIS, *et als.* } Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

Joseph P. Hornor, being duly sworn, deposes and says: That he is counsel of record in this cause for Charles T. Howard, Esq., and was such also in the Circuit Court, and

was present in said Circuit Court on the 15th day of April, 1879, when the cause was submitted, as appears from the extract from the minutes on page 48 of the printed Transcript of Record in this case; that the entry upon said minutes is correct; that it was made after the presiding judge had delivered an oral opinion refusing the injunction *in limine* asked for by the bill, and it was made by the unanimous consent of all parties, there being no dispute as to the facts of the case, and counsel for complainant being desirous that a final decree might be entered, in order that he could take up the case to this Supreme Court.

JOSEPH P. HORNOR.

Sworn to and subscribed before me, at New Orleans, La., this 7th day of April, A. D. 1882.

MARK BREEDEN, JR.,
*Notary Public.*

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SUPREME COURT OF THE UNITED STATES.

[No. 284, October Term, 1881.]

THE CITY OF NEW ORLEANS,
*vs.*
JOHN A. MORRIS, *et als.*,

U. S. OF AMERICA: *ss.*

James A. Charbonnet, being duly sworn, says; that he was the minute clerk of the U. S. Circuit Court for the then district of Louisiana in April, 1879; that he made the entry on minutes found at p. 48 of printed transcript of record, and the same is correct and conforms to the facts as deponent understood then; that it was made after the presiding judge had delivered an oral opinion refusing the injunction asked for by the bill; that the cause was then submitted by consent of all parties, and the impression left on deponent's mind was that the solicitor for complainant desired that a final decree should be entered in order that he might appeal the case to the Supreme Court.

The draft of the decree as appearing on page 48, of the printed record is in the handwriting of Henry B. Kelly, one of the counsel for the defendants, and it was handed to me after the cause had been so submitted to be presented to

the judge for signature. And said draft was signed by the judge on the same day of the submission of the cause, to wit: the 15th day of April, 1879.

J. A. CHARBONNET.

Subscribed and sworn before me April 7th, 1882.

[SEAL.] F. A. WOOLFLEY,
*Commissioner United States Circuit Court,*
*Eastern District of Louisiana.*

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1881.

THE CITY OF NEW ORLEANS,
*Plaintiff in Error,*
*vs.*
JOHN A. MORRIS ET AL. } No. 284.

When this cause was submitted to the court below for decision, as set forth in the entry on the minutes of the 15th of April, 1879, see transcript, p. 48, it was with the understanding, on the part of counsel for all parties, that, in accordance with the opinion of the court previously expressed, a final decree should be rendered dismissing the bill, from which complainant could appeal to the Supreme Court.

It was understood at the time that the controversy was not as to the matters of fact averred in the plea, as to the truth of which there was no dispute, the only facts averred in the plea being that the respective judgments in favor of the defendants, referred to in the bill, were all recovered upon obligations of the city antecedent in date to the passage of Act No. 33 of the Extra Session of 1877, and that the property of the city claimed to have been exempted by this act from liability for the antecedent debts of the city, was of very large value, the valuation put upon it by the statute itself being over a million of dollars, and that the real and actual value of it was over three hundred thousand dollars.

It was distinctly understood by the counsel for the city, at whose instance I signed the stipulation referred to in the brief, at p. 13, and myself, when I signed the stipulation that there was no controversy between the parties as to the facts averred to in the plea, and I required a statement to this effect to be embodied in the stipulation before signing

it. It was not only the understanding of counsel, but of the court, that there was no controversy as to the facts pleaded, for it sustained the plea and dismissed the bill.

HENRY B. KELLY,
*Of counsel for John Klein and others, Def'ts.*

Under such circumstances a replication would be a vain formality.

*Tiernan* vs. *Poor*, 1 Gill & Johnson, Md., p. 216.

II.

A new point is raised in this court, for injunction, which is not pleaded in the bill, viz: that the Circuit Court of the United States had no power, in 1879, to issue the writs of *fieri facias* to execute its judgments rendered on the law side. To this we may reply:

(*a.*) No such ground of injunction is set up in the bill.

(*b.*) It can, in no event, furnish a reason for equitable relief, for if the writs were irregular it would be for the Court of law, which issued them, to quash or prohibit them on motion; and the Court of Chancery would have no right to interfere.

(*c.*) No State law can deprive the Circuit Courts of the United States of the right to execute their judgments by seizure of property.

*Wayman* vs. *Southard*, 10 Wheaton, 1.
*Bank* vs. *Halstead*, *Id.*, 51.

To permit this would be to permit a State to deprive the Federal Courts of jurisdiction.

*Riggs* vs. *Johnson Co.*, 6 Wall., 189, and authorities cited.

(*d.*) The practice act of 1875, R. S., § 916, does not, in terms, *take away* any right or power of the Circuit Courts.

See opinion of Mr. Justice Woods in a case of the City of New Orleans, delivered at Atlanta about July, 1879, and not reported.

City vs Morris
3 Woods 115

III.

The reply made in appellant's supplemental brief to our points on the jurisdiction of the lower Court, is insufficient. Our position is briefly, that whether the City of New Orleans as defendant in her own interest, or in behalf of some supposed beneficiary of an alleged trust, desires to regulate, quash or prohibit the seizure of personal property, said to be exempt from execution, she must apply to the court of law that issued the writs and whose power is ample. The articles and cases cited by appellant in reply, do not militate against our position. They are precisely what were considered in *Van Norden* vs *Morton*. They show that whether it be a third person or a defendant who feel aggrieved by the method of execution of a writ from a court of law, he must apply to that court for redress.

*Oger* vs. *Daunoy*, 7 Martin, N. S., 657.

A Court of Equity only interferes where under some well recognized rule of equity jurisdiction there arises a a case in which the Court of Law, by reason of its peculiar method of action, is powerless to give relief.

*Farrell* vs. *McKee*, 36 Ills., 225.

The distinction between law and equity, and between the Circuit Court as a court of law and the Circuit Court as a Court of Equity, is fundamental in the constitution of the United States and the laws of Congress.

In the case at bar the Circuit Court as a court of law had rendered certain valid judgments in favor of certain of the defendants, had issued certain writs of *fi fa*., and had seized certain personal property of the complainant. As a court of law, it had under the law of Louisiana, and on general principles, in the language of *Van Norden* vs. *Morton*, full "control over its own officer in the execution of its own writs." The Circuit Court, as a court of chancery, had no

more right to interfere with such process, except for fraud in the judgment, or for some other specific ground of equitable jurisdiction, than if it were a separate tribunal with chancery powers, such as exists in some of our States.

In the language of the same decision, the proper remedy was the one provided by the code of practice of Louisiana, "a simple application to the court, from which the writ issued to remedy the evil of an erroneous levy of the execution." "It has no element of equitable right or precedure, and as a Court of Chancery, the Circuit Court had no jurisdiction of the bill."

In *Van Norden's* cose your honors held that even a third person in Louisiana could not go into the Court of Chancery to enjoin the sale of personal property which he claimed, since he had under the code of Louisiana a plain and adequate remedy at law, and it was said that the remedy was as applicable to "other misconduct of that officer, [the marshal,] as in cases of seizure of property not liable under an execution in his hands."

We understand from this language that if a third party, whose property is wrongfully taken under execution, has in Louisiana a plain and adequate remedy at law by summary motion to the court of law issuing the writ, *a fortiori* has a defendant himself who claims that the writ has been laid on property exempt from execution. He has no equity to go into what is logically another court, another jurisdiction, and attack the doings of the court of law under its process. It is only where the court of law, by reason of its peculiar methods of action, is powerless to help him in a matter where he is entitled to *equity*, and that he can thus go off and invoke the aid of the Court of Chancery. 36 Ills., 225.

*Imlay* vs. *Carpentier*, 14 Cal., 173;
*Green* vs. *Thomas*, Id., 86:
*Fahs* vs. *Roberts*, 54 Ills., 192.

So, whether the complainant has filed her bill on her own behalf entirely, or in the interest of some supposed third person who may have some relation to the stock, she is in the wrong tribunal.

Respectfully submitted,

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*for Defendants.*

*April 12, 1882.*

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Art. 829 ⅋
831 §